The Law Society

Property in Practice

The magazine of the Property Section

INSIDE

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Issue 89 December 2024

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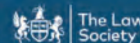

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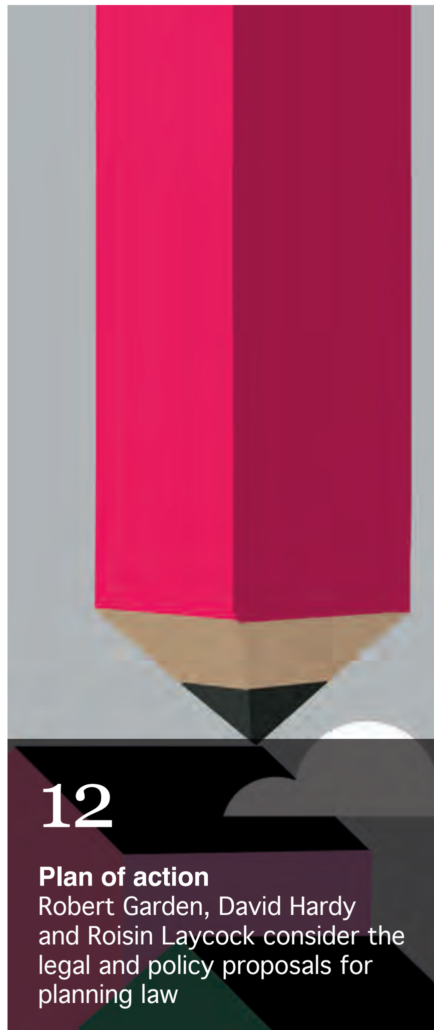

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News and events

Consultation

TA6 Property information form (5th edition) (2024)

Sarah Dwight is a sole practitioner in Birmingham. She sits on the Conveyancing and Land Law Committee and is leader of the Residential Property Working Sub-Group

Conveyancers will be aware that the Law Society released an updated version of the TA6 form to help provide prospective buyers with the information suggested in the National Trading Standards Estate and Letting Agency Team (NTSELAT) guidance on material information in property listings. The proposed changes are intended to:

- assist solicitors to help their clients provide the information required to market the property, and
- enable consistency of the information provided during marketing through into the legal process.

If a TA6 form is completed by a seller, with their solicitor's help, at the same time as the seller's estate agent starts preparing the sales particulars, a copy of the completed TA6 form can be given to the estate agent to enable their property listing to include the material information from the seller.

Having consistent information and well-informed buyers benefits solicitors by:

- making the conveyancing process more efficient
- reducing the incidence of uncompleted conveyancing transactions, and
- providing improved service to clients.

Despite these benefits, the introduction of the proposed changes caused much debate, and after listening to feedback from practitioners, led to a consultation with members that has recently closed. The Law Society's Conveyancing and Land Law Committee and TA6 Working Group are considering the responses to the consultation and feedback from various bodies and will share an update in the new year.

Conveyancers can continue to use both the 4th and 5th edition of the TA6 form beyond January 2025 until the Law Society has analysed all the evidence and decided on next steps.

As part of the consultation and engagement around the new TA6, the Law Society recorded two webinars on areas of concern:

- Understanding the TA6 - the legal position, and
- Digital developments in residential conveyancing

The webinars are free and available, below:

tinyurl.com/2e96742t

NEWS

Foresight report: Smart buildings

The Futures and Insight team at the Law Society has published a report examining the intersection between artificial intelligence (AI), internet of things (IoT) technologies, and smart buildings within the context of the property law sector.

Authored by Dr Tara Chittenden, it provides property lawyers and relevant stakeholders with insights into the current landscape, emerging trends, and the outlook for AI and IoT in smart buildings.

The report aims to equip professionals with the insights necessary to navigate the evolving complexities of smart building development, operation, and management.

tinyurl.com/m64zz53r

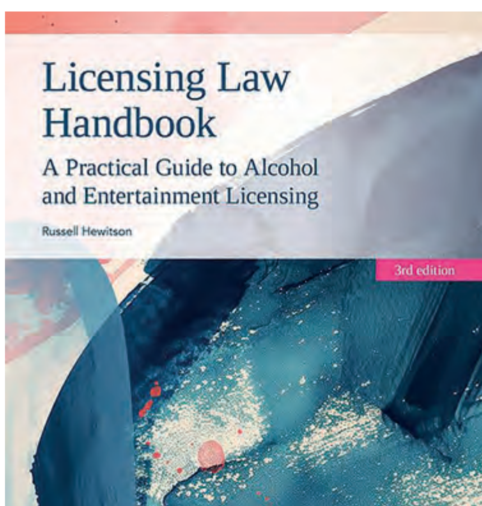
EVENTS

Bitesize highlights – Automation, transformation and digitisation of anti-money laundering processes (on demand)

Listen to the key highlights from the Leadership and Management Section, Risk and Compliance Section and Property Section seminar that was held in October 2024. All the highlight recordings below are audio-only, around two to eight minutes long and focus on frequently asked questions answered by industry experts.

tinyurl.com/wa3wvn52

BOOK



Licensing Law Handbook (3rd), new edition

Containing all the most recent guidance on good practice in residential conveyancing, this handbook is a crucial resource for answering queries arising from day-to-day property transactions. The new edition of the *Licensing Law Handbook* is a clear and concise guide to the reformed system of licensing. It will safely guide you through all aspects of the new and revised procedures including how to apply for authorisation, the forms to use, operating schedules, how to object to an application, offences, closure powers and appeals, so nothing is overlooked.

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EVENTS

Restriction on title: top tips for private client and property lawyers (on demand)

Join this recorded online event to understand the various restrictions on title that executors, trustees, attorneys and deputies may need or come across and how to deal with them from both a private client and property solicitor perspective.

Our speakers will discuss different scenarios such as:

- If I am a deputy or attorney, what restrictions might be wanted or needed to be put on the property to protect the client?
- What restrictions are needed for trustees?
- What executors and personal representatives need to add to the title?
- How to deal with the common restrictions when the property is being sold.
- What the land registry will allow you to record on the title now and how to protect interests given this.

Free to members of Property and Private Client Sections.

tinyurl.com/2zuhe5sk

HM Land Registry's addresses are changing

HM Land Registry is changing its external-facing addresses for business customers.

The new addresses came into force for business customers on 2 December 2024. For a transitional period of 12 months, however, any incorrectly addressed correspondence will be diverted to the correct address, allowing customers time to adjust their systems.

The process for invalid cheques will stay the same.

The new addresses are:

Royal Mail address for business customers
HM Land Registry (Insert name of closest office)
PO Box 7803, Bilston WV1 9QN

DX address for business customers
HM Land Registry DX 427301
BILSTON 3

HMLR will be updating the return addresses in its letters and on its stationery over the coming weeks, but customers may see a mixture of the old and new addresses for a short time.

Anyone who sends applications for registration should update their processes and systems to ensure the correct HMLR address is used.

To avoid confusion, customers should not address correspondence to any member of HM Land Registry's staff by name. Correspondence will be directed to the right official on receipt.

'Tis the season...

Clare Harman Clark, the Property Section chair, wonders what Santa is likely to bring for property practitioners in 2025

As I write this, we're lumbering towards another seasonal round of mince pies and fizz, with all eyes turning to the high street.

Looking past the festive poinsettias and last-minute stocking fillers, up and down the country we can see the desolate reality of shuttered shops. High street vacancies currently hover around 14%, considerably higher than pre-pandemic days. Official statistics suggest one in seven high street shops is currently closed. The sad fact is that this appears to be the result of a decade of lockdowns, disruptions, austerity and the relentless rise of internet shopping.

The government has long been promising action and is poised now to 'breathe new life' into the beleaguered sector by allowing local authorities to use High Street Rental Auctions (HSRAs) to tackle the blight of shuttered shops.

The idea, which was put forward in Part 10 of the Levelling-up and Regeneration Act 2023, is deceptively simple. From 2 December, councils will be able unilaterally to identify "persistently vacant properties in city, town and village centres" across England and (without the owner's consent) put them up for auction. The move effectively gives the potential tenants (businesses and community groups) a "right to rent" the commercial space for one to five years (excluding security of tenure under the Landlord and Tenant Act 1954).

However, like all deceptively simple ideas (flying reindeer anyone?), the mechanics are trickier in practice. More detailed guidance is awaited, but once the shut-up shop is identified (warehouses don't count), councils will still need to engage with the owner across a multi-month timetable of notices, property information gathering and marketing.

This legislation is largely about bringing the parties to the table. If the owner fails to engage, it can result in a criminal offence and fines. To get as far as a HSRA, the council will need to show that the premises was unoccupied for the whole of the last year (or for at least 366 days in the last two years). Vacant lot landlords may well want to take note that there's no exemption from MEES requirements when the new lease is granted.

Early adopter local authorities (which include Darlington, Mansfield and Bournemouth) are expected to take "immediate action" to champion HSRAs. Given that most local authorities are already overburdened, however, it will be interesting to see how many HSRAs actually occur.

We'll be considering HSRAs in more detail in the next edition of *Property In Practice*, but in the meantime this edition is full of Christmas gifts to keep you up to date in 2025. For example, while we wait for the publication of the Law Society's practice note on the subject, Meena Kamath of the Chancery Lane Project outlines how you can drive climate-conscious property transactions. And with Labour vowing to make commonhold "the default tenure by the end of the parliament", Lisa Bevan of Taylor Wessing LLP considers the plans in more detail.

Clare Harman Clark is Senior Counsel – Knowledge at Taylor Wessing LLP and chair of the Property Section

High energy

Part of the new government's rental reforms include a commitment to increase energy efficiency in private rental accommodation. Richard Pulford outlines the proposals

Richard Pulford *is a senior associate at Boyes Turner*

Improved energy efficiency in homes has been much discussed in recent years, but in practice sufficient resources were never allocated to make any proposed scheme workable. However, Ed Miliband recently confirmed Labour's commitment to increase the minimum energy efficiency standards (MEES) required on energy performance certificates (EPCs) in rented accommodation to a C rating by 2030. This may seem a long way away, but due to the scale of the task, it's worth considering well in advance of implementation.

Current rules

Currently, before advertising a property for letting, a landlord is required to either have, or have commissioned, an EPC for the property. This confirms the current energy efficiency of the property on a rating from A-G, with A being the most energy-efficient rating achievable. The EPC also provides a guide to what measures can be taken to increase the energy efficiency and what rating the property could achieve as a result.

In addition, each landlord or managing agent will need to answer the following questions:

- Is your property let on either an assured tenancy (which includes assured shorthold tenancies), a regulated tenancy or a domestic agricultural tenancy?
- Is your property legally required to have an EPC?

If the answer to both of these questions is 'yes', then MEES also apply. This means that landlords can't let out a property unless it has, at minimum, an E rating. If the property does not meet that required standard, then to let it the landlord will need to undertake improvement works. Alternatively, the property may qualify for one of the exemptions under the Private Rented Sector (PRS) Exemptions Register, which includes, among others, a high cost exemption where the costs of even the cheapest recommended improvement are over £3,500 (for a full list of exemptions see tinyurl.com/mr2chskf). Any of these exemptions would need to be registered with the PRS Exemptions Register prior to the start of any tenancy. Subject to taking all these steps, a landlord would be able to let out the property despite a substandard rating.

These rules have been in place for some time now and the criteria and exemptions will be well-known to most property practitioners. That the need for exemptions within the current ratings is highlighted signals that many landlords who already rely on exemptions will have to comply with the more stringent and onerous obligations coming down the pipeline.

Proposed standards

Poor energy efficiency and escalating fuel costs have meant that many families are unable to effectively heat their properties. The new government wants to lift a million households out of fuel poverty and will "take action to reverse these failures of the past and stand with tenants, with a commitment to consult by the end of the year on boosting minimum energy efficiency standards for private and social rented homes by 2030".

Impact of higher standards

Of course, commitments of this kind have been watered down in the past. The original MEES rules came into force in late 2020 and the plan then was that the initial minimum rating of an E was temporary and that the C standard would apply for new tenancies by 2025 and existing tenancies by 2028. This indicates that targets are vulnerable to amendment or delay, subject to shifting policy concerns.

Nevertheless, if landlords are to work on the basis that the rules will come into force as planned, or at least a version of them, then early planning is required. Current figures for the rental market are that just over 50% of new EPCs carried out this year have achieved the C rating, so a significant improvement will be required for many residential landlords.

The potential benefits of energy-efficient homes are wider than environmental ones. With energy costs continuing to rise, a transition from an E rating to a C rating is likely to save on average £1,200 a year in utility bills. Lower energy costs are an attractive feature for prospective tenants, particularly if they can stay in the property for a longer term (more probable once the Renters' Rights Bill comes into force and section 21 notices are abolished).

The initial cost of the works required will likely be payable by the landlord (unless suitable funding is obtained) while the benefit of lower bills is more likely to be realised by the tenant. With changes to renters' rights, profit margins for landlords will be tighter, and if they are required to spend more than £10k to improve the energy efficiency of a property, many landlords may leave the market altogether.

That said, any major desertion of the market could create opportunities for large-scale landlords who either have the funds to cover costs or have made enough periodic improvements to ensure compliance well ahead of the proposed deadline.

Diligent landlords, knowing that improvements are inevitable, will be moving towards a C rating with incremental increases, and will be in a better position than those who assume that changes will be indefinitely delayed. For now, we don't know what the final details of the scheme will be. While there will likely be caveats and sources of funding available to make the scheme work, what appears to be clear is that energy efficiency is very much back on the agenda.

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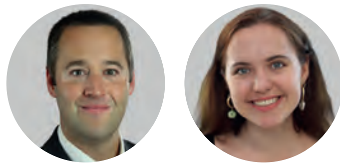
On budget

Matt Spencer and Úna Campbell consider the measures outlined in the autumn budget and decode its impact for property practitioners



Matt Spencer *is a partner and* **Úna Campbell** *a trainee in the real estate and construction team at Kingsley Napley LLP*

Rachel Reeves's 30 October autumn budget rolled out substantial changes to property taxes, particularly affecting second homes, landlords and commercial property transactions. With significant adjustments to stamp duty land tax (SDLT) and capital gains tax (CGT), property investors, tenants, home buyers and sellers across the UK are likely to experience the ripple effects. Here, we break down the budget's key takeaways from a property perspective and explore the potential consequences of these changes for the UK market.

Stamp duty surcharge on investors

From 31 October 2024, anyone purchasing a second home or additional property in England and Northern Ireland, or any purchase of a dwelling by a company, faces a 5% SDLT surcharge, up from 3%. For companies acquiring residential properties above £500k that do not benefit from a relief from the 'enveloping' rate of SDLT, the rate jumps to 17%, up from 15%.

If you exchanged before 31 October 2024, you escape these increases at completion if you do not vary or assign the agreement, and completion is not pursuant to an option.

Impact on buyers and landlords

The top rate of SDLT is now an eye-watering 19%. Combined with the restrictions on offsetting mortgage interest and the removal of CGT reliefs introduced in recent years, investing in residential real estate is looking less and less attractive. It therefore seems likely that the number of investment purchases will fall as the increased surcharge directly raises costs for investors in rental properties or holiday homes. For example, a second home priced at £300k would now incur an SDLT surcharge of £15k in addition to the £2,500 base SDLT cost, potentially discouraging would-be buyers from entering the investment market. The SDLT nil-rate band will also revert to £125k from April 2025, adding £2,500 to SDLT bills from this date, assuming the relevant property costs £250k or more.

The gulf between residential and non-residential SDLT rates is now larger than ever. Notably, there has been no change in the rules or rates for mixed-use or non-residential properties and more purchasers may pursue transactions that are not entirely residential, or will push to find a non-residential element to their transactions as a result.

The definition of residential land is (unavoidably, in our view) imprecise and its meaning has been challenged repeatedly in the courts and tribunals. Given the widening disparity in SDLT and the increasing attraction of attempting to claim the non-residential rates, the number of disputes may escalate. Does a grazing licence turn a manor house into a mixed-use purchase, for example? If that house and land cost £5m, the SDLT saved by successfully claiming non-residential SDLT rates (assuming the surcharge would otherwise apply) exceeds £500k. In an HM Revenue & Customs meeting with the Chartered Institute of Taxation and the Stamp Duty Practitioners Group in 2018, it was suggested grazing licences could justify a non-residential classification, but case law has been fickle in this regard (it may be potentially arguable that the grazing licence merely improves the amenity of the land, for example).

Landlords, meanwhile, may face tighter profit margins, as higher acquisition costs can eat into returns. Those considering expansion might hesitate, curbing demand for properties in this sector and slowing the growth of rental portfolios.

Impact on tenants

For tenants, this surcharge has the potential to tighten the rental market further, as fewer landlords starting or expanding their portfolios may reduce rental supply. In areas where rental demand remains high, such as London, tenants could feel the effects in the form of rising rental prices, intensifying affordability challenges for many.

CGT adjustments

In what came as a shock to many, the budget has frozen CGT rates for residential properties, while increasing rates for commercial properties, which are now in line with those for residential properties (at a top rate of 24%). It appears the government listened to the industry, and perhaps shifted the tax increase from existing portfolios (via CGT) to new acquisitions (via the SDLT rise discussed above).

This CGT change took effect from midnight prior to the budget and,

undoubtedly, there will have been disposals on the day of the budget (perhaps before the speech) where the sellers faced a significant increase in their tax bill. It was anticipated that CGT would increase, and you could argue sellers should have disposed of assets prior to budget day, but it means that those selling property at 9am on 30 October 2024 incurred a CGT rate that was not public knowledge at the time. There does not appear to be a sensible rationale as to why the implementation date did not align with that of the SDLT changes (from 31 October 2024). While some transactions would have been rushed through, at least sellers would have known the resulting outcome of their actions.

Impact on commercial property sellers

For those holding commercial assets such as office spaces or warehouses, the CGT hike will reduce the net returns on sales, potentially deterring some investors from selling in the hope that rates will fall in the future. With profit margins affected, many commercial property holders may choose to hold on to assets longer, which is likely to slow commercial property turnover in the short term. This has the potential to affect sectors that rely on a steady supply of commercial space, potentially stalling redevelopment projects or new commercial opportunities in the process. The CGT rise is not as great as many expected, however, and we anticipate that the government hopes sellers will not be put off transactions by the 4% increase in the top rate of CGT.

Impact on residential property sellers

For residential property sellers, the CGT freeze provides stability in an otherwise turbulent tax environment. Long-term investors with substantial gains will still face high CGT bills but the budget has not increased them, and any plans they may have had might remain viable. However, given the SDLT increase on the other side of their sales, landlords and investors may still find it challenging to profit from long-held residential assets in the face of the increased tax the purchaser will need to factor into their offer.

Stamp duty changes across the UK

While the budget changes are targeted at England and Northern Ireland, Scotland and Wales maintain separate tax structures, with similar surcharges for additional properties under their own systems. As a result, regional differences will remain.

In Scotland, the ‘higher rates’ additional charge (equivalent to the English 5% surcharge) is 6%. In Wales, the rate is 4%. The English rate, in comparison, is therefore relatively similar and not disproportionate. These regional differences mean prospective buyers looking at properties across borders will need to carefully consider the tax implications and the added cost of acquiring properties outside their primary residence in any part of the UK.

Key takeaways

The changes introduced in the budget will likely have notable consequences across the property market, including the following.

Landlords

Facing increased SDLT (if purchasing residential assets) and higher CGT on commercial sales, landlords may slow their property acquisitions and adjust rental prices if their competition reduces, particularly in high-demand areas. This could influence the rental market, potentially leading to higher rents, and exacerbating the current pressure on the cost of living.

Tenants

With acquisition costs higher for landlords and rental supply constrained, tenants may experience increased competition for properties and rising rents, particularly in urban centres and popular regions.

Residential sellers

Although CGT on residential properties has been frozen, long-term investors will still face tax liabilities on appreciated properties, affecting those considering retirement or significant portfolio changes.

Commercial sellers

The CGT hike on commercial property transactions will impact on net profits from sales, deterring some owners from selling. This could have a knock-on effect on the commercial property market, particularly if owners choose to hold on to properties until tax conditions become more favourable. Given many expected much worse, however, the impact may not be too great.

The government’s autumn budget 2024 presents a targeted strategy to increase revenue from the property market by focusing on second homes, rental properties and commercial assets. For home buyers, sellers, landlords, and tenants, these changes underscore the importance of a strategic approach to financial planning. With potential effects on everything from property supply to rental costs and investment returns, understanding these updates is crucial for navigating the shifting landscape of the UK property market.

Beast of burden?

Is the regulatory burden for solicitors increasing or does it just seem that way? Duncan Finlyson considers recent developments

It is not uncommon for solicitors to wonder when they will find time to carry out client work in the face of the ongoing barrage of regulatory duties with which they have to comply. It would be nice to report that compliance obligations and threats of sanctions are going to diminish but, regrettably, this is not the case. Recently, we have seen a plethora of large fines, new regulatory duties and Solicitors Regulation Authority (SRA) proposals and plans that could make the practice of law even more difficult for many small to medium-sized practices.

Many of the obligations appear to emanate from the SRA, but the House of Lords, the government, the Legal Services Board (LSB) and the consumer lobby all have a role in contributing to the regulatory burden and increases in penalties. Potential solicitors could be forgiven for opting for the safer option of becoming lion tamers.

Increased regulatory powers

Earlier this year the SRA called for the power to launch “wide sweeping inspections” of law firms even where there have been no allegations made or suspicion of misconduct on the part of the firm. The request was made by SRA chief executive, Paul Philip, while giving evidence to the House of Lords on strategic litigation against public participation (SLAPPs), during which he also called for increased fining powers.

Baroness Stowell of Beeston, the chair of that committee, felt that the SRA should have the power to impose far higher fines on firms than it does currently. She stated that the SLAPPs bill then going through parliament offered “a rare and valuable opportunity to enable the regulator to impose fines that actually deter wrongdoing and stop law firms from profiting from SLAPPs cases” and that the current limit of £25,000 “is very small given the overall turnover of these firms”. Clearly, the belief that all law firms are making vast amounts of money is still widespread in the House of Lords. It’s worrying too that once the SRA gets the power to impose higher fines in SLAPPs cases, it will want those powers extended in relation to other issues.

Alex Chalk, the former lord chancellor, stated in May that there was a growing case for a review of the regulatory framework brought about by the Legal Services Act 2007. Chalk’s comments were in response to a statement from the justice select committee to the effect that “the needs of consumers are not being met as much as they should be”. The new lord chancellor, Shabana Mahmood, has a lot of pressing issues to deal with so it remains to be seen if regulatory review will be a key priority for the new government.

Quality indicators

The LSB is once again advocating to empower consumers to make effective choices when selecting law firms to represent them. It has warned regulators over the possibility of enforcement action unless they speed up the process of “developing quality indicators to help consumers choose lawyers”. This would allow consumers to shop around for the cheapest (although not necessarily the best) deals.

‘Transparency’ has been much discussed at the LSB, so it is not unreasonable to expect to see firms facing more rigorous policing of the current SRA Transparency Rules. There is even the possibility for the expansion of those rules into other sectors of work, or a tightening of the requirements placed upon firms in relation to it. Either way, it is unlikely to be good news for law firms – especially if the SRA acquires the power to levy higher fines. Revised transparency guidance was issued by the SRA in June 2024 and the SRA continues to carry out desk-based reviews of solicitors’ websites. Those who have received a notification from the SRA regarding their website will know that the tone of the letters can be somewhat threatening, and in some cases contains reminders that penalties will be issued for incorrectly informing the SRA that a website was, or is, compliant.

Abolishing client accounts

The regulator is also considering abolishing client accounts. Client account abolition has been suggested as an option before, when third party managed accounts (TPMAs) were proposed as an alternative to client accounts in 2015. However, it was not until June 2017 that TPMAs would be

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allowed – and then only when the new version of the SRA Accounts Rules came into effect in 2018. In its statement announcing the new Accounts Rules, the SRA did indicate that the use of TPMAs could result in a reduction in indemnity insurance costs and the duties of the SRA – although nothing was offered to back up these statements.

Following this flurry of activity, not a great deal was heard about client account abolition. TPMAs have, it's true, continued to be available and several firms have used them over the intervening period. They have also proved to be a means for freelance solicitors to hold client money.

The first public announcement that the SRA was again considering abolishing client accounts came in May 2024 when Paul Philip stated that the cost of regulation would "drop like a stone" if solicitors were prevented from holding client money. In his remarks, Philip claimed that by abolishing the right for solicitors to hold client accounts, the costs of regulation would be reduced, the public would be made to feel safer, anti-money laundering requirements would be reduced and cybercrime would become a thing of the past.

The SRA argument appears to be that following the example of the Axiom Ince case, solicitors are not fit to manage their own client accounts and that instead they should be outsourced to escrow accounts or TPMAs.

Consumer protections

Of course, these proposals are not completely new, even this time round. They feature in a discussion paper on the SRA website entitled *Protecting the public: our consumer protection review*, published in February 2024. Here, the SRA argues that the Axiom Ince intervention has made consumers feel less secure, and due to the pressure on the compensation fund consumer protection measures may not be sustainable.

SRA proposals

The SRA proposes some possible options, including:

- enhancing risk identification processes by using intelligence collected by the SRA to identify problems before they get out of hand (becoming more interventionist in the general sense of the word)
- strengthening checks and controls including business plans, funding plans and governance structures, and cross-checking with other organisations for higher-risk firms
- bolstering monitoring and supervision
- putting in place structural firm controls to prevent a small number of individuals controlling management and compliance decisions, and
- assessing ownership models and corporate structures for issues such as sustainability, risk and transparency.

The most controversial of the proposed targeted controls is around client accounts and client money. These could include reviewing:

- the abolition of client accounts in favour of some form of managed account, if not for all firms, then certainly for those firms deemed higher risk
- the way in which money is taken up front
- how client account residual balances are handled
- the interest that firms can retain on client funds held in client accounts, and
- the requirements in relation to accountants' reports and increasing them.

The Law Society opposes proposals to stop firms from using client accounts. In July, Law Society president Nick Emmerson said: "The ability to handle client money is an important difference between solicitors as regulated professionals and unregulated services providers. Client accounts are a fundamental tool for the efficient and effective delivery of many types of legal services. Most firms comply with all the rules. Unfortunately, there are an exceptional few who abuse their position and careful consideration should be given to applying appropriate and proportionate safeguards that might reduce risks to consumers."

The danger is that the solution of curbing client accounts is more damaging than the problem it is designed to remedy. In fact, it could be argued that the problem of dishonest solicitors may be exacerbated by the push for greater access to legal services at a lower cost, without questioning the ability or suitability of others to deliver those services.

Penalties

The regulatory problems faced by solicitors are further highlighted by the current spate of increasingly large fines for regulatory breaches – many for past offences and largely in connection with anti-money laundering (AML). Many of the AML penalties are for failures to:

- conduct appropriate due diligence on clients
- undertake firm-wide and matter risk assessments, and
- translate the conclusions from those risk assessments into appropriate policies, controls and procedures.

It's essential that firms take seriously their AML requirements and put in place the appropriate policies and training to ensure that all staff are aware of the firm's obligations. The fact that no harm has been caused by a firm's failure to do so will not be a relevant factor, as recent fines for firms of £23,000 and £46,000 has clearly demonstrated.

It's unlikely that in the immediate future firms will feel less put upon by regulation. The reality is that regulation is necessary and those who transgress need to be called to account. Firms do need to manage themselves and the work they do for their clients more effectively, but it's equally important that the profession is not so strictly regulated that it can no longer represent the interests of the ordinary person. If the cost of regulatory compliance increases overheads too far, costs will rise, and the ordinary person will be even less likely to be able to afford legal representation than they are now.

Most solicitors are hard-working, conscientious and honest, and do the best they can for their clients. Increasingly, however, they find themselves between a rock and a hard place: neglecting compliance obligations means they will be fined by the regulators and neglecting clients means they will be accused of not adequately representing them. It's a balancing act to get it right, and one that is increasingly difficult.

This article first appeared in the October 2024 issue of *Legal Compliance*

Plan of action

Changes to planning law are on the agenda. Robert Garden, David Hardy and Roisin Laycock consider the legal and policy proposals and their impact on the planning regime

Robert Garden *and* **David Hardy** *are partners and* **Roisin Laycock** *is a senior associate in CMS's planning team*

The government has placed planning changes at the heart of its aim to build more houses and expand infrastructure to kickstart economic growth. Here, we consider its proposals along with several high-profile cases that will affect property practitioners advising on planning matters.

Planning cases challenging development

R (Finch) v Surrey County Council

In June 2024, the Supreme Court handed down its much-awaited decision in *R (on the application of Finch on behalf of Weald Action Group) v Surrey County Council* [2024] UKSC 20.

Finch concerned a challenge to a development consent for an onshore oil and gas development on the basis that the relevant environmental impact assessment (EIA) did not consider indirect emissions (commonly referred to as 'scope 3' or 'downstream') from the combustion of eventually refined hydrocarbons produced by the development. The core issue in the course of the litigation concerned a developer's obligation under the Town and Country Planning (Environmental Impact Assessment) Regulations 2017 (EIA Regulations) to prepare an environmental statement (ES) describing the likely significant effects of a development (both direct and indirect). The question was whether this extended to include an assessment of the scope 3 or downstream greenhouse gas emissions resulting from the use of the end product originating from the development, in this case the ultimate end use of the oil produced by the development.

In December 2018, Horse Hill Developments Ltd (HHDL) sought planning permission from Surrey County Council (the council) to retain and expand an existing onshore oil well site and to drill for new wells.

The EIA Regulations require that an EIA be carried out before planning permission can be given. This includes a requirement to prepare an ES regarding the likely significant effects of the development. The ES produced by HHDL considered the environmental impacts of emissions from the construction, production and decommissioning of the well site itself, but did not consider the downstream emissions arising from the end use of the oil to be produced from the site. Following the EIA process, the council granted planning permission for the development in September 2019.

The court decided, by a majority of 3–2, to allow the appeal. As a result, the council's decision to grant planning permission was quashed.

To consider the "effects of a project", the majority considered it "obvious" that the question was one of causation. It was significant that the parties all agreed that it was not merely likely, but inevitable, that the oil produced at the site would be refined, combusted and result in greenhouse gas emissions. The court considered that this brought about "the strongest form of causal connection", such that downstream emissions were plainly "effects of a project" to extract oil.

This is a significant case, particularly for the oil and gas industry, but also more widely given the focus on the proper interpretation of the EIA Regulations.

It is important to note that the EIA Regulations do not prevent a relevant authority from granting permission for a development that is likely to cause significant harm to the environment. The EIA Regulations do, however, require the authority to reach a reasoned conclusion on the environmental impact and to take this into account in making its decision.

Since the Supreme Court's decision in *Finch* there have been the following key developments:

- In October, North Lincolnshire Council agreed to a quashing order in respect of its decision to grant planning permission for the expansion of operations at an oil and gas drilling site, after a High Court claim was launched following the *Finch* decision.
- In *Friends of the Earth Ltd v Secretary of State* [2024] EWHC 2349 (Admin), the court was concerned with a planning permission that had been granted for the extraction of coal at Whitehaven and whether an EIA had been carried out lawfully. The court found, applying *Finch*, that the decision to grant planning permission was unlawful and quashed it. One of the key issues that arose was where a case for substitution is made as part of the EIA process – here, that the coal mine in question would have

a neutral or even beneficial effect on global emissions as its coal would replace coal imported from the US – robust evidence must be provided to support this.

- The Department for Energy Security and Net Zero launched a consultation on 30 October 2024 concerning updated environmental guidance for offshore oil and gas projects following the decision in *Finch*. Hopefully, the result will be robust guidance on how developers should approach *Finch* going forward.

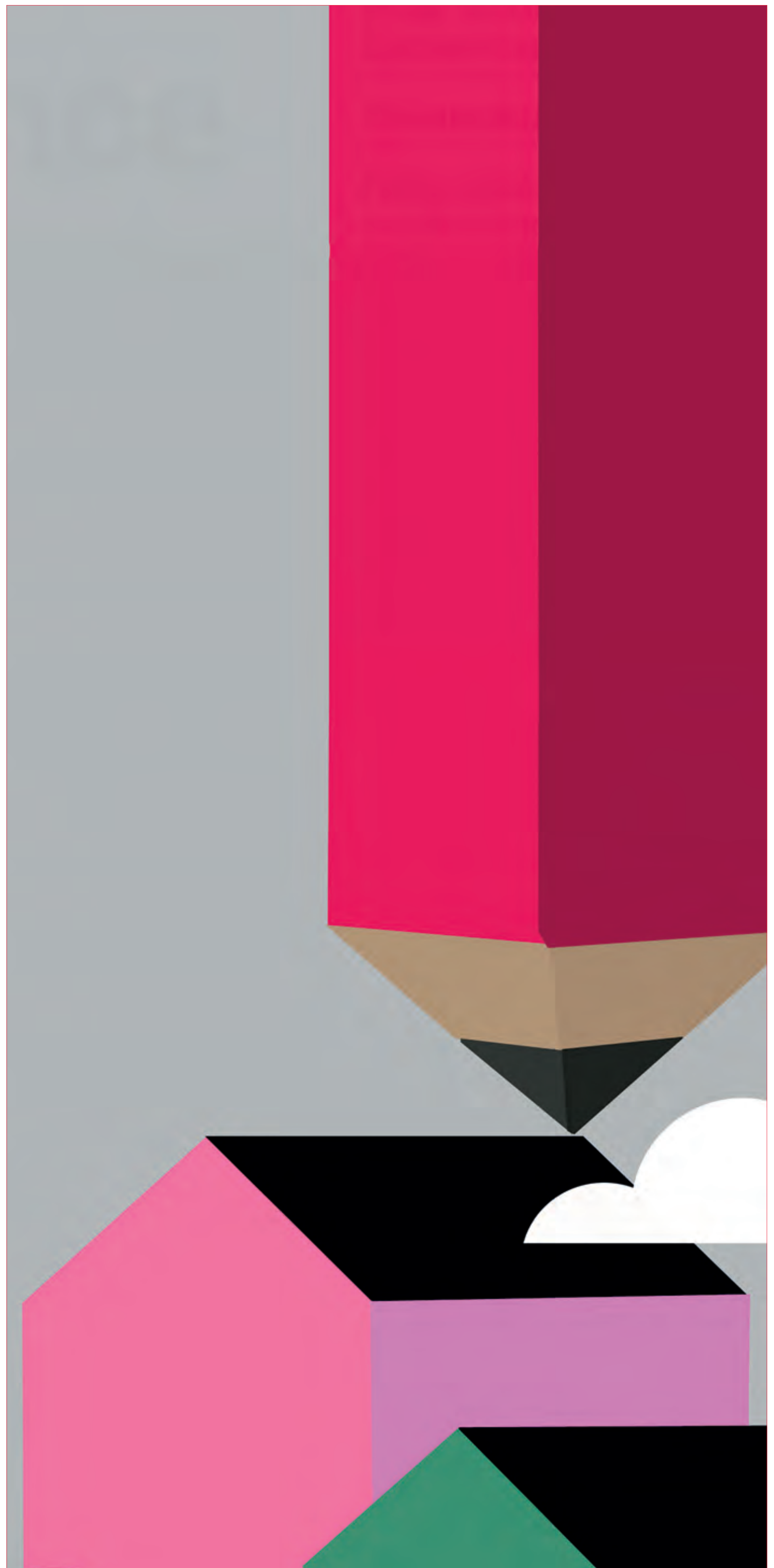
Fry & Son Ltd v Secretary of State for Levelling up

In June 2024, the Court of Appeal handed down another much-awaited decision in *CG Fry & Son Ltd v Secretary of State for Levelling up, Housing and Communities* [2024] EWCA Civ 730. In *Fry*, the Court of Appeal grappled with whether it is lawful for a competent authority to undertake an appropriate assessment pursuant to the Conservation of Habitats and Species Regulations 2017 (the regulations) when considering an application for reserved matters or the discharge of planning conditions.

In 2015, the claimant received outline planning permission for its development and subsequently received reserved matter approval pursuant to that outline planning permission (subject to conditions) in 2020 for 190 dwellings. In 2021, the claimant sought discharge of the conditions attached to the reserved matter approval, but the local planning authority (LPA) withheld its approval on the basis that a habitats regulations assessment (HRA) pursuant to the regulations was required.

On appeal, the planning inspector agreed with the LPA, holding that an appropriate assessment under regulation 63 was required to discharge the conditions. The decision was reaffirmed by the High Court.

The Court of Appeal dismissed the developer's claim on all three grounds. The Court of Appeal did not find any reason why an appropriate assessment under the regulations could not be required either for reserved matter approval or condition discharge. An appropriate assessment may be required by an appropriate authority before that authority determines "any consent, permission or other authorisation" (pursuant to regulation 63) for a plan or project if "the 'authorisation' in question is necessary to enable the project to be lawfully implemented" [paragraph 74 of the judgment].



This is a material case for all sectors, but notably for the housing industry where issues such as nutrient neutrality have led to significant constraints on development. The case has led to further calls for legislative intervention to address this issue. On 1 November, the Supreme Court granted permission for an appeal.

Policy developments

National Planning Policy Framework

On 30 July 2024, the government issued an updated draft National Planning Policy Framework (NPPF) for consultation. The NPPF is the primary national planning policy document for town and country planning in England and how these policies should be applied.

The headline grabber has been the reintroduction of mandatory housing targets, which reflects the new government's approach of putting housing and planning at the forefront of its growth agenda. The aim of this amendment is to build 370,000 homes per year and achieve the government's commitment of 1.5m homes over this parliamentary term.

Beyond this, the government's promise to build on 'poor quality' land in the green belt has the potential to bring thousands of neglected sites around cities into consideration. The draft NPPF seeks to do this by reclassifying parts of the green belt as 'grey belt' land.

The Conservative government amended the NPPF in December 2023, and the new government's consultation draft unpicks a number of those amendments. The current consultation ended on 24 September 2024.

The government will need to review the responses, which will likely take a few months. Stakeholders are hopeful that a revised NPPF will be published before the end of the year.

Onshore wind and energy

The government's first major policy statement on 8 July 2024 was to remove the planning barriers that had acted as a de facto ban on new onshore wind development in England over the past decade.

The current NPPF sets out two policy tests that only apply to onshore wind. The effect of the government's policy statement is that these policy tests no longer apply. The removal of these tests from planning policy means that onshore wind applications will be treated in the same way as other energy development proposals. This move has been unanimously welcomed by the onshore wind and clean energy industries, and is likely to open up a significant amount of land to assembly and development work.

The government is currently consulting on bringing large onshore proposals into the Nationally Significant Infrastructure Projects (NSIPs) regime pursuant to the Planning Act 2008. The proposed threshold is for schemes over 100megawatts (mw).

It is also consulting on amending the threshold for solar schemes from 50mw to 150mw for solar projects. This would mean that projects falling below these revised thresholds could be determined at a local level, rather than through the NSIPs regime. The rationale for this is to keep up to date with changing technology so that projects "follow a proportionate process to secure consent". This, and the proposal with respect to onshore wind, will require amendments to the Planning Act 2008.

Legislation

Planning and Infrastructure Bill

It was announced in the King's speech that a Planning and Infrastructure Bill will be introduced to reform planning and accelerate the delivery of high-quality infrastructure and housing. The bill has five key aims:

1. Streamline the delivery process for critical infrastructure by simplifying the development consent regime and enable new and improved national policy statements to come forward. The hope is this will fast-track certain infrastructure projects through the planning system, but it hasn't been decided if any new sectors (such as housing) will fall under the NSIPs regime.
2. Reform compulsory purchase compensation rules to ensure landowners are paid fair (but not excessive) compensation where important social and physical infrastructure and affordable housing are being delivered. The Levelling-up and Regeneration Act 2023 (LURA) already allows the secretary of state to direct that hope value will be ignored for certain compulsory purchase order schemes; this may now be extended.
3. Improve local planning decision-making by modernising planning committees. While this is light on detail, anything that helps depoliticise the decision-making process will be welcome news to developers.
4. Increase LPAs' capacity to improve performance and decision-making. The resourcing issues experienced by planning departments across the country are one of the biggest obstacles to development, and while Labour's recent commitment to appoint 300 new planning officers is good news it may not go far enough.
5. Use development to fund nature recovery – where both are stalled – to deliver positive environmental outcomes.

Improvements to the planning regime itself can only be a good thing, but the proposal to achieve this through yet more primary legislation is concerning, given how long it took the last government to get major planning legislation on to the statute books.

Great British Energy Bill

The King's speech also outlined proposals for a Great British Energy Bill. This will help to achieve energy independence and unlock investment in energy infrastructure by establishing a publicly owned clean power company, headquartered in Scotland, which will invest in renewable energy projects across the UK. The government will also support the development of nuclear power, sustainable aviation fuel, carbon capture, and green hydrogen.

This, coupled with the proposed amendments to the NPPF, will likely increase planning applications for renewable energy projects, potentially requiring planning authorities to adapt their policies and expertise.

Looking ahead

The government's focus on planning reform, house building, and energy and infrastructure development is a strategy to get Britain building again. By taking a collaborative approach, breaking down well-established barriers to development and prioritising sustainable development, the response to the proposed reforms has been largely positive. Despite this, we will still have to wait for the proposed policy to address the fallout from *Finch* and to find out if the claimant in *Fry* is successful in the Supreme Court.

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Rental interest

The Renters' Rights Bill introduces the biggest changes in landlord and tenant law since the 1980s. Anna Bennett considers the proposals

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At the time of writing, the Renters' Rights Bill (the bill) was at committee stage and, given the representations made by various interested parties on behalf of landlords, tenants and on the operational side, will no doubt be subject to changes as it progresses through parliament. Here, I discuss the proposed changes based on the bill as currently drafted.

Many private landlords have expressed concerns about the removal of the 'no-fault' mechanism for obtaining possession under section 21 of the Housing Act 1988, as well as increased regulation and control over the clauses they can include within their tenancy agreements. But there are significant implications for registered providers of social housing too, as everything from their supported accommodation to their shared ownership products will be affected by the removal of fixed terms and the abolition of assured shorthold tenancies. Landlords from both sectors will require support from landlord and tenant specialist lawyers to help them navigate the numerous proposed changes.

Abolishing assured shorthold tenancies

One of the election promises of both the current and previous governments is the abolition of the right of a landlord to serve a section 21 notice to end a tenancy without giving a reason. Assured shorthold tenancies will no longer exist. This is headline-grabbing and although it can be a concern for any private landlord who has previously used it by default to get possession of a property, any landlord and tenant lawyer will know that relying on a section 21 notice and using it to follow an 'accelerated route' is not always straightforward.

Unlike in the previous Renters (Reform) Bill, there will be no transitional period. So when the Renters' Rights Act (the act) commences, any claims or section 21 notices that have been served but where no proceedings have started, will no longer be viable. Any claims already underway in the county courts will be allowed to continue, and these tenancies will be treated as assured shorthold tenancies until the possession claims are concluded.

To try and address landlord concerns about the removal of section 21, a significant number of new possession grounds, mainly mandatory, have been introduced to Schedule 1 of the Housing Act 1988.

Some of the proposed grounds will require a statement within the tenancy agreement as to the fact that the landlord can rely on that ground to be given before the tenancy is issued, the so-called 'prior notice ground'.

Abolishing fixed terms

Fixed terms for all assured tenancies will be abolished, meaning that any existing tenancy will effectively be automatically converted into a periodic tenancy, and if the tenancy has a weekly or monthly rent period then the period will align with that rent period. For any tenancy where the rent period is over one month, there is a formula within Part 1, Chapter 1 of the act that will serve to convert that tenancy to the new period.

Concerns have been expressed about the removal of fixed terms by both private and social landlords. For private landlords, they will be removing the certainty attached to knowing that the tenant will be there for, say, one year or longer, and for social landlords certain products will fall away, including longer fixed-term tenancies. Shared ownership leases will no longer be treated as assured shorthold tenancies, which will have an impact on the way that enforcement action can be taken against those residents if they refuse to pay rent or breach their lease in other ways.

Rent increase notices

If the bill is enacted as proposed, private landlords will not be able to rely on any rent increase clauses within their existing tenancy agreements, so increases will be limited to no more than once a year. Landlords will have to follow the procedure under section 13 of the Housing Act 1988, which will be amended to require that two months' notice is given and rent increases cannot be applied until the outcome of any challenge to the First-tier tribunal (FTT) is known.

Additionally, there may be more challenges to unfair rent increases in the FTT, which will ensure that no rent increases go beyond the market rent for that type of property.

Statement of terms

Landlords will have a duty to give tenants a written statement of terms and conditions before the tenancy commences. A landlord must include within the statement of terms any 'prior notice' grounds for possession, such as:

- where a tenancy is subject to a superior lease that will end
- where a property is to be sold under a rent-to-buy scheme
- student accommodation
- stepping stone accommodation, or
- supported accommodation where a tenant is refusing to engage with support.

For existing tenancies, wording will be issued via regulations before the commencement of the act to ensure that those 'prior notice' grounds can be relied upon.

Pets and other matters

Tenants will have the right to request to have a pet on the premises and landlords will have a corresponding right to require the tenant to obtain, or to pay, for pet insurance should they do so.

Tenants will also be required to give two months' notice to quit if the tenancy is silent under the tenancy terms and conditions.

Clauses that are deemed to be discriminatory, such as those that may discriminate against people on benefits or families, will be prohibited.

Landlord redress scheme

Something that has had less press attention but will have significant implications for private landlords and their advisers is the introduction of the landlord redress scheme, essentially an ombudsman for the private rented sector.

Membership of the landlord redress scheme will be compulsory for private landlords and will likely be paid for by its members. The ombudsman will have the power to arbitrate disputes between parties and hopefully avoid claims being issued in the county court. The ombudsman will have powers to compel landlords to apologise and to pay fines or compensation to tenants.

Private rented sector database

A private rented sector database will be established to ensure that there is a full database of all rented properties and all landlords. This will create greater transparency in the sector and tenants looking to rent will be able to view entries both for the landlord and the property to see if either has previously been subject to adverse findings or enforcement action for breach of legislation.

Before any property can be marketed, landlords will need to ensure they have entries on the database for both the landlord's identity and the dwelling house. Not doing so will be a breach of the regulations and the landlord can be fined.

Decent Homes Standard and Awaab's Law

Social landlords have been subject to the Decent Homes Standard for many years and the regime will be extended to private sector landlords under the bill. The Decent Homes Standard itself hasn't been looked at for 20 years and will be subject to consultation first.

The obligations under Awaab's Law will also be extended to private landlords. They will need to ensure they can respond within shorter, set time-frames to reports of conditions such as damp and mould, and to treat those hazards before they become more serious.

Enhanced enforcement powers

All these duties and obligations will be backed up by enhanced enforcement powers that will be given to local housing authorities (LHAs). LHAs already have powers to:

- investigate and issue enforcement action against landlords who are found to have properties with health and safety hazards
- administer licensing schemes for houses in multiple occupation, and
- deal with breaches of those licensing obligations.

These powers will be enhanced to ensure any potential breach by a landlord of landlord and tenant legislation, such as not giving a statement of terms, not being a member of the landlord redress scheme or having a valid entry into the database, would be enforced and prosecuted by the appropriate LHA. Any fines applied by the LHA would be enforceable as if they were county court orders and may be anything up to £7k for a first breach and up to £40k for repeated or serious breaches.

In addition, tenants will be given enhanced rights to apply for rent repayment orders that are enforceable against superior landlords. The penalties will be doubled, and repeat offenders may be ordered to pay maximum amounts.

Challenges for landlords

Landlords may need legal support in navigating the changes imposed by the new act, both before and after it comes into force. Tenancy agreements will need to be checked to ensure that the clauses included are compliant with the new rules.

Registered providers of social housing will also need to consider which tenure policies will need amending, given that fixed-term tenancies are to be abolished. Starter or probationary tenancies and demoted tenancies will also no longer be possible.

Landlords will also need guidance as to whether they are complying with the new regulations both in terms of the form of tenancy agreements and information that they give to tenants. They will further need guidance in terms of their obligations under the Decent Homes Standard and Awaab's Law, and the obligations to be members of the landlord redress scheme and (when it's operational) the private rented sector database.

Finally, at the point that landlords do need to recover their properties, they may require support in following the section 8 procedure and the grounds that they will be able to rely upon.

Impact on the courts

One difficulty that the bill does not address is the current lack of resources in the county courts and the amount of time taken for even straightforward possession claims to be processed and decided (not to mention the then inevitable delay in getting bailiffs to attend).

During the committee stage, a suggestion was put forward that mandatory claims should be dealt with via the paper route rather than through hearings, to mirror the current accelerated route for section 21 notices. However, if taken up, the complexity of proving some of the new grounds as opposed to checking the validity of a section 21 notice, will inevitably impact the judicial time required to decide these cases. It does not appear that the government has the financial resources or political will to support any large-scale changes at present. As a result, it appears likely that the scheduled changes will have a negative impact on the timescales for landlords in pursuing possession claims.

After Grenfell

Phase 2 of the Grenfell inquiry report was published in September. Ian Quayle considers its implications for property practitioners

Ian Quayle *is the chief executive officer of IQ Legal Training, the managing editor of* Property Law UK *and the co-author of* Building Safety Act 2022, *published by the Law Society*

The recent publication of the *Grenfell Tower Inquiry: Phase 2 Report* (inquiry report) on 4 September 2024 (tinyurl.com/muzsxtu8) has implications for the construction industry, building owners, leaseholders and society at large. In this article, I focus on the effect of the findings on lawyers advising on transactional matters for clients involved in the ownership and management of higher-risk buildings and/or the leaseholders of flats and apartments.

The necessary reform on the back of the report is still to come, but in the future reform will be introduced to give effect to its recommendations.

Current position

It's important that a property lawyer undertaking residential or commercial property transactional work is aware of the risk status / classification of any building forming part of a transaction.

The relevant building classification has positive benefits for both residential leaseholders and commercial tenants due to the application of schedule 8 of the Building Safety Act 2022 (BSA). Although the schedule is titled 'Remediation costs under qualifying leases', the addition of 'et cetera' to the title highlights that schedule 8 protects not only residential long leaseholders holding qualifying leases, but all residential leaseholders and commercial tenants (to varying degrees), where landlords are transmitting remediation costs for relevant defects into service charges.

Here, however, we will focus on the status of higher-risk buildings (HRBs) and part 4 of the BSA.

What are HRBs?

An HRB is a building that is over 18m tall or consists of at least seven storeys and has at least two residential units. Unfortunately, what appears to be a clear

and simple definition (at least within the scope of the BSA) has been complicated by how the height of a building is calculated and/or how the number of storeys is counted. The practical consequence of this is that clients and lawyers alike are unable or unwilling to determine the status of the building by reference to the BSA and its ancillary regulations.

Registration of an HRB

The government guidance initially provided some useful clarification on the need for an HRB to be registered with the Building Safety Regulator under the Building Safety (Registration of Higher-Risk Buildings and Review of Decisions) (England) Regulations 2023, which came into force in April 2023. The deadline for registration for existing buildings was 9 September 2023 and new buildings must be registered and have a relevant completion certificate or final certificate before residents can occupy it.

Definition of an HRB

An additional burden for transactional property lawyers arises as both the BSA and the accompanying regulations acknowledge that an HRB may contain one or more high-rise residential structures. So, whether a residential structure is a single building depends on whether that structure is connected to another structure either by a walkway, lobby or basement that contains a residential unit or an internal wall containing normal-use doors. If a higher-risk building is made up of more than one high-rise residential structure, it is necessary for the higher-risk building to be registered, and for the Building Safety Regulator to be provided with information for each structure.

Another complication arises due to the Higher-Risk Buildings (Descriptions and Supplementary Provisions) Regulations 2023, made under section 62 of the BSA. Regulation 4 details what constitutes a "building" for this purpose by reference to the "structure" (which is defined as a "roofed construction with walls"), so that where:

- a "structure" that is not attached to any other "structure", that structure is a "building"
- a structure which is not attached to any other structure contains two or more "independent sections", each "section" is a "building", and
- two or more structures are "attached", that set of structures comprises a single "building", but if they contain one or more "independent sections", each such section is a "building".

An "independent section" is defined as "a section that:

(a) has access, which can be reached from anywhere in the section, for persons to enter and exit the wider building; and

(b) either

(i) has no access to any other section of the wider building, or

(ii) only has access to another section of the wider building which does not contain a residential unit."

For this purpose, access is a doorway or similar opening except where it is intended for "exceptional use", including emergency use or for maintenance purposes.

Exclusions

It's important to understand that the Higher-Risk Buildings (Descriptions and Supplementary Provisions) Regulations 2023 exclude the following from being

HRBs for the purposes of the BSA:

- hospitals and care homes
- secure residential institutions
- hotels and motels
- military premises, and
- prisons

as long as the building is comprised entirely of the types the regulations specify.

Building and fire safety risks

Part 4 of the BSA concerns HRBs and refers to "building safety risk". This term is defined by section 62(1) to mean a risk to the safety of people "in or about" a building from the spread of fire, structural failure and any other prescribed matter that occurs.

The concept of building safety risk is not irrevocable, and the BSA allows for additions to the list of risks that landlords are responsible for in an HRB.

Where a building is higher risk or will gain that status on completion of construction, renovation or alteration, there are several consequences:

1. Terms are implied into residential long leases due to section 133 of the BSA amending the Landlord and Tenant Act 1985.
2. A new section 20D is inserted into the Landlord and Tenant Act 1985 requiring the landlord to take reasonable steps to ascertain both if grant funding is available to meet remediation costs, and whether money can be recovered from third parties, including insurers, developers or third parties involved in the design or maintenance of the building.
3. The building owner, accountable person or principal accountable person has additional building safety duties and obligations imposed on them.
4. It's likely that residential leaseholders and commercial tenants are going to incur more service charge costs as a result of the additional management costs incurred as a result of point 2.

The BSA also includes a number of fire safety measures, such as:

- embedding fire safety in the design of buildings by introducing gateway 1, requiring HRB applicants to provide a fire statement demonstrating the approach to fire safety, and obliging the local planning authority to consult with the Health & Safety Executive (HSE) before determining a planning application
- requiring a residents' engagement strategy to be submitted in order to obtain a building assessment certificate (confirming compliance with obligations under the BSA following registration)
- providing documentation to the residents or owners of residential units, including a fire safety case report setting out the risks in the building and how they will be managed, the residents' engagement strategy and details of the complaints procedure, and
- creating and retaining a "golden thread of information" relevant to the design and construction of the building, any building works, and the provision of prescribed documents – including any structural safety measures, maintenance and inspections undertaken, details of complaints and plans of the building that can be accessed by residents, the Building Safety Regulator and fire and rescue authorities.

The BSA provides an opportunity for amending the definition of an HRB – see sections 120D–120H of the Building Act 1984 and sections 65–70 of the BSA.

Recommendations of the inquiry

A single regulator

Despite the creation of the Building Safety Regulator in part 2 of the BSA, the inquiry report highlighted the fragmentation of construction regulation as problematic. The different government departments separately responsible for the building regulations and guidance, product regulation, the fire and rescue services and building control, was described as a "recipe for inefficiency and an obstacle to effective regulation".

The recommendation is for a single construction regulator – reporting to a single secretary of state, supported by a chief construction adviser responsible for all functions of the construction industry.

Higher-risk buildings

The inquiry report regards the current definition of an HRB to be arbitrary and recommends an urgent review of the definition of HRBs.

As outlined above, the current definition is causing confusion for all concerned, but a more subjective and flexible definition could exacerbate the situation. Perhaps the answer lies in extending the existing requirements so that registration is not just dependent on height or storeys, but also on the mobility and vulnerability of occupants, the state and condition of the building and the existing fire safety measures.

However, given the likelihood that some of these factors could fluctuate and the status of the building could change, making equivalent changes to building safety, landlord management and leaseholder compliance could create more uncertainty, not less.

Fire safety strategy

The report also recommended introducing a statutory requirement for any building control applications (at gateway 2) for the construction or refurbishment of any HRB to be accompanied by a fire safety strategy, that is reviewed and resubmitted at the completion of any building works. The primary aim of the strategy is consideration of the needs of vulnerable people, including any additional facilities or time they may need to leave the building or reach a place of safety within it.

This requirement is additional to the Phase 1 report recommendation that the owner / manager of an HRB should be required to prepare personal emergency evacuation plans for those with additional needs.

Accessible record of recommendations

The purpose of a publicly accessible record of recommendations is to ensure that any government is accountable for the decisions taken in relation to HRBs. This means if a government decides not to accept any recommendations that are made, it will have to record its reasons for doing so and report to parliament each year.

Problems with contractors

To alleviate problems with contractors, the report recommends:

- a licensing scheme, operated by the construction regulator, for principal contractors that wish to undertake the construction or refurbishment of HRBs, and
- that any application for building-control approval for the construction or refurbishment of an HRB (gateway 2) is supported by a personal undertaking from a director or senior manager of the principal contractor to take all reasonable care to ensure that, on completion and handover, the building meets the regulatory standards to make it safe.

Other compliance factors

Other recommendations include the following:

1. As mentioned, a single construction regulator to take control over construction product compliance and specifically account for legislative requirements, statutory guidance and industry standards.

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2. A formal requirement or specific qualification for fire engineers, with legislation to define and protect the profession, and an independent regulatory body set up for that purpose.
3. Fire risk assessors that are subject to mandatory accreditation and set up by the government in order to assess and ensure adequate competence and standards.

Leasehold and Freehold Reform Act 2024

The Leasehold and Freehold Reform Act 2024 (LFRA) has affected some issues concerning HRBs, although it has not clarified some of the identification issues discussed, nor has it put into play the recommendations of the inquiry report.

Some of the issues concerning HRBs that have been affected include section 119 of LFRA introducing a new section 125A to the BSA. This is aimed at improving local authority and regulator awareness of buildings where the person with repairing obligations in relation to the relevant buildings is insolvent. It imposes new duties on insolvency practitioners who are appointed in relation to a responsible person for a higher-risk (18m or seven storeys) or relevant building to give specified information within 14 days of their appointment for the area in which the building is situated. If the insolvency practitioner is appointed in relation to an accountable person they will have to give the required information to the Building Safety Regulator.

Section 115 of LFRA amends section 123 of the BSA to provide expressly that the First-tier tribunal (FTT) may order a relevant landlord to "do one or both of the following by a specified time:

(a) remedy specified relevant defects in a specified relevant building;
(b) take specified relevant steps in relation to a specified relevant defect in a specified relevant building."

Consequences for practitioners

The BSA and all relevant regulations and guidance have attempted to generate certainty as to what an HRB is, but the situation for advisers and their clients is still wholly confused. Despite the height / storey test, it's difficult to confirm whether a residential leasehold involves a property in a higher-risk building. In practice, all that can be done is to rely on information provided by third parties or confirmation that the building has been registered as a high-rise residential building with the Building Safety Regulator.

The recent case of *Blomfield v Monier Road Limited (Smoke House & Curing House, Remus Road)* (2023) has recently added to the confusion.

The case involved an application for a remediation order but during the hearing, the FTT had to consider the extent of the works to which the order related and whether the original contractors should be entitled to carry out the works. Of interest to the lawyers was the debate concerning whether the building to which the remediation order related was a higher-risk building. The FTT concluded that the building was an HRB since it included a roof terrace containing a garden, which could be deemed a seventh storey.

The significance of this decision is that the FTT was not prepared to follow government guidance published on 21 June 2023, which provided that "a storey must be fully enclosed to be considered a storey". The FTT condemned the guidance for contradicting the statutory provisions.

As a result of this decision, the Ministry of Housing, Communities and Local Government published a notice at the start of the guidance confirming that it and the Building Safety Regulator are currently considering the views expressed by the FTT. The notice advises that until stated otherwise, the sector and regulatory bodies should continue referring to existing government guidance.

Transactional property lawyers need to appreciate and warn relevant clients that flats or apartments in buildings that are not currently defined as HRBs could become so where:

- an airspace development occurs, increasing the height or number of storeys beyond the current limits, or
- a building that meets the current height or storey requirements but is exclusively occupied by commercial tenants is converted to include two or more residential dwellings (note such dwellings do not have to be let on residential long leases).

Given the findings in the inquiry report, it seems that regulations amending the definition of HRBs will in future have to consider the nature of the use of the building and the status of its occupants, particularly vulnerable people. Whether these amendments make it easier to spot a higher-risk building for the purposes of the conveyancing process seems unlikely.

Going underground

Laurence Howland does a deep dive into Chinese underground banking, outlining how it works and how the risk impact on property firms in the UK can be mitigated

It was reported in the legal press at the end of August that seven people had been convicted and sentenced to terms of imprisonment for laundering over £55m through a Chinese underground banking network. Police officers in Stoke Newington, London, started an investigation into the group following intelligence reports that they were selling British currency to Chinese university students through a popular Chinese language messaging app. The cash used to supply the British currency was collected by the group from unknown couriers in bulk, sometimes up to £250k at a time.

Informal value transfer systems

Chinese underground banking is not a new phenomenon. Hundreds of years before the development of formal banking processes, traders are known to have used trusted intermediaries to facilitate cross-border payment and currency transfer. These processes developed independently across many cultures and continents and are often described by academics as 'informal value transfer systems' (IVTS). The Arabic and south Asian equivalent is called 'hawala' and was practically unknown in western countries until 2001 when American investigators discovered that some of the money used to fund the 9/11 attacks had been moved through hawala processes, inextricably (and largely unfairly) linking hawala to terrorism in the minds of US policymakers.

Chinese underground banking itself was almost entirely unknown in the UK outside the Chinese community until October 2019, when a National Crime Agency (NCA) report, *Chinese Underground Banking and Daigou*, highlighted the potential risk of criminal funds being moved through IVTS processes.

It's a mistake to think of underground banking as a single process. As a professional service, a 'qianzhuang' or 'money shop' will use a wide variety of techniques to move value across borders, including cash smuggling, trade for the sole purpose of transferring value and breaking large sums down into smaller sums below the official reportable limit for transfer through multiple bank accounts. At a personal level, individuals frequently rely on family and friends to send money abroad through their personal bank accounts to evade China's tough currency controls.

The reported modus operandi of the Stoke Newington group suggests that currency transfer was being paid for in China, from Chinese bank accounts, but that the currency handed over in the UK was sourced from 'street cash' derived from drugs sales or other serious crime. This allowed the organised crime group to dispose of criminal property acquired in one country through ostensibly legitimate activity and 'transfer the value' to their preferred jurisdiction.

Regulation and legislation

China is not currently formally listed as a high-risk third country for anti-money laundering (AML) purposes, but the risk from Chinese underground banking was flagged in a Legal Sector Affinity Group (LSAG) guidance note published in March 2023 (tinyurl.com/yw69ax6m). The note highlights the danger that funds can be used to support, for example, a property transaction that may have been legitimately accrued in the country of origin but supplied in the UK out of cash or other funds derived from illegal activity. Accepting cash derived from such activities could potentially amount to acquiring criminal property and / or entering an arrangement which facilitates someone else's acquisition, transfer, use or control of criminal property, even in circumstances where the client has not knowingly engaged in any unlawful activity. Both offences attract severe criminal sanctions and long terms of imprisonment under the money laundering provisions of the Proceeds of Crime Act 2002 (POCA).

Recent case law suggests that the courts are likely to take a robust approach to enforcing money laundering legislation. In March 2023, the High Court dismissed a claim for judicial review of a forfeiture order for over £67k transferred through an IVTS process (see *Fresh View Swift Properties v Westminster Magistrates Court* [2023] EWHC 605). The claimants had transferred funds from Nigeria using an unregistered money service business (MSB) who – in classic underground banking style – had paid the funds into Fresh View's UK account via an ostensibly unconnected third-party account. The court determined that while there was no evidence that the funds had been unlawfully obtained in Nigeria, the fact that they had passed through an unregistered MSB in the UK effectively criminalised the entire sum under the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017, rendering them liable to forfeiture under the civil provisions of POCA.

The judgment noted both that the directors of the company knew they should have used a regulated MSB, and that forfeiture of the sum concerned was "a proportionate response to meet the high societal need to tackle money laundering". Arguably, the case leaves it open to foreign nationals to continue to use informal family and friend networks to transfer money to the UK, but it appears that the use of commercial unregulated money transfers will not be tolerated by the courts.

Risk and red flags

For those engaged in property work, the danger posed by funds transferred via underground banking further escalates the risk profile of conveyancing, an area of work already assessed as comparatively high-risk for money laundering purposes by both the NCA and the Law Society. Property transactions are typically high-value and, in recent years, the UK

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property market has increasingly attracted foreign investors including politically exposed persons (PEPs) and those from high-risk jurisdictions like Russia. Complex trusts and overseas corporate structures have historically been used successfully to obscure the real ownership of residential and commercial properties. Add to this the risk of money being transferred through unregulated and unverifiable processes, and it's easy to see how lack of awareness and failure to conduct proper due diligence could lead to a serious regulatory breach or even criminal penalty.

The recent highlighted risk from Chinese underground banking is linked in part to China's economic success and the growth of ethnic Chinese populations in the UK and other Western countries. However, IVTS processes are similarly associated with other countries such as Vietnam, India, Pakistan and some Middle East and African countries. These transfer processes are also used by diaspora communities in the UK and elsewhere who are likely to be familiar with, and have access to, them.

The LSAG guidance indicates that the following red flags may indicate the use of IVTS and potentially suspicious activity:

- transfers of sums just below the threshold of reportable transactions in the country of origin (currently US$50k in China)
- sums received from multiple third-party company or individual accounts with no direct link to the transaction
- multiple payments to retailers of high-value goods
- multiple sums of similar figures or 'round figures'
- information from the client that appears to be suspicious, inconsistent, contradictory or false, and
- a client who insists on providing their own translations of foreign supporting paperwork.

The guidance also stresses the importance of conducting proper verification of source of funds and source of wealth (where the money came from and how it was accrued). It is likely to be difficult, if not impossible, to conduct a comprehensive investigation into the origin of money used to fund a transaction, but the law requires that you take reasonable steps to confirm and verify as far as possible the information you have been given. What is reasonable will depend on the client, the matter and the surrounding circumstances, including national risk guidance. In relation to funds sourced from overseas, you should consider:

- refreshing your memory as to current risks and what is on your firm-wide risk assessment
- asking the client pertinent questions
- obtaining bank statements
- obtaining proper translations of any documents that you do not understand
- seeking out reliable information about the country of origin of the funds (such as transparency corruption rating and the Financial Action Task Force Mutual evaluation report)
- carrying out due diligence on companies that have transferred money, and
- using official sources to confirm the standing of overseas professionals.

You should document and retain any evidence you collect, including how you came to your decisions, and keep those records for the period required under the Money Laundering Regulations (at least five years from the conclusion of the transaction, and sometimes longer).

Reporting suspicious activity

It is a criminal offence under section 330 of the Proceeds of Crime Act for a person in the regulated sector (including most solicitors) to fail to properly disclose activity which they know, or suspect, constitutes money laundering, during the course of their business. The disclosure or suspicious activity report (SAR) must be made to the Money Laundering Reporting Officer (MLRO) or to the designated contact point at the NCA, generally through the SARS online system.

Where the transaction is ongoing or has not yet taken place, you must submit a defence against money laundering (DAML) SAR and obtain authority to carry out the transaction. In most cases authority is given within seven working days, although the NCA can refuse consent, in which case you will be unable to proceed with the transaction or transfer any money held without further authority.

If NCA consent is given, you are then approved to continue with the transaction in question and cannot be prosecuted for a related money-laundering offence under sections 327–329 of POCA. You are only protected in relation to the criminal property and transaction that are described on the SAR you have submitted. Therefore, it's critical that you properly explain:

- what the criminal property is
- who you suspect
- why you suspect them
- what offence you believe you would be committing in the absence of NCA consent, and
- what you require consent to do.

It's important to note that the NCA can only grant consent in relation to the three money laundering offences under sections 327–329 of POCA, and for no other purpose. NCA consent does not convey authority to breach sanctions or to engage in fraud or any other criminal activity.

There is no overriding requirement to report suspicions of underground banking. But the stringent legislative requirements to report any suspicion of money laundering, together with the current focus on money moving from China, means many compliance officers will conclude that it's best practice to do so.

Bear in mind, too, that obtaining consent from the NCA does not necessarily mean that it's a good idea to proceed with a high-risk transaction. You are perfectly entitled to decline to act if a transaction falls outside the risk appetite of your firm.

Best practice

Government, law enforcement and regulators will no doubt continue to place significant demands on regulated businesses in general, and property lawyers in particular. The best way to protect your people and your firm is to:

- keep up to date with the latest advice and guidance
- properly maintain your firm-wide risk assessment
- make sure you know your clients and understand your client matters
- carry out effective due diligence on the client and their funds
- report any suspicions to your MLRO or to the NCA, and
- document everything important and keep records

Understanding underground banking and informal value transfer systems, along with sound risk management and properly documented decision-making, leaves your firm well-placed to engage effectively with what is an increasingly important – and potentially profitable – client base.

In commonhold

Commonhold is once again on the agenda as a form of property ownership. Lisa Bevan outlines the plans

Commonhold was first introduced under the Commonhold and Leasehold Reform Act 2002 as a viable alternative to leasehold ownership of flats. Despite its initial promise, take-up has been minimal, and only a handful of property lawyers will have encountered commonhold in practice.

Background

Following the Law Commission's 2020 report *Reinvigorating commonhold: the alternative to leasehold ownership*, the last government, after an extended consultation process, reintroduced it in the Leasehold and Freehold Reform Act 2024. The act was given royal assent just prior to the election in July 2024.

In this summer's King's speech, it was announced that the new Labour government intends to enact the Law Commission's 2020 recommendations and also place restrictions on the creation of new leasehold properties, with the aim that commonhold becomes the "default tenure of flat ownership".

Commonhold allows freehold ownership of individual residential units within a building or estate, coupled with membership of a commonhold association that owns and manages the communal areas. It is like strata or condominium types of ownership that operate in other jurisdictions such as the United States, Canada and Australia. With leasehold arrangements, ownership is time-limited by a lease, there can be escalating ground rents and potential service charge issues with third-party landlords, and often there is a lack of control, over costs in particular, for leaseholders. Attempts in the past to revive commonhold as a concept have floundered, but with the momentum of the Leasehold and Freehold Reform Act 2024, and a new government signalling its bold intentions on leasehold reform, could commonhold finally take over from leasehold?

Challenges to implementation

Several factors have contributed to the low take-up rate of commonhold tenure so far, including the following.

1. The legal processes involved in setting up a commonhold in England and Wales are unfamiliar and potentially complex. Developers are concerned that the legal fees to set up a commonhold scheme will be significantly higher than for a standard leasehold arrangement and worried that buyers will be fazed by higher costs at their end.
2. Lenders have been hesitant to offer mortgages for commonhold properties due to the perceived risks around the potential insolvency of a commonhold association. Commonhold associations will be limited companies and if unit holders fail to make their contributions, there will be a risk of insolvency as the commonhold association will not have the right of forfeiture that a landlord has in relation to a leasehold flat.
3. Developers have preferred the familiar leasehold model with built-in income streams in the form of ground rents and lease extension premiums. There has been a reluctance to be the first to step into the unknown, with the potential impact on finances, and reputation, if the scheme is not successful.
4. Consumers have limited understanding of commonholds and how they will work in practice. For example, unit holders would become jointly liable for health and safety compliance, which is increasingly onerous following the advent of the Building Safety Act 2022. While control over service charges may seem an appealing prospect, not all unit holders will welcome such a level of responsibility and risk. This is particularly the case in new developments of flats in London where many are owned by overseas buyers and are often sublet.

Law Commission recommendations

The Law Commission's 2020 report put forward several recommendations aimed at simplifying and encouraging the use of commonholds. These included the following.

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Simplification of conversion process

The current process for converting existing leaseholds into commonholds is cumbersome and requires both unanimity and the consent of the freeholder. Reforms would streamline procedural requirements, reducing barriers to conversion by providing that a majority vote of leaseholders could compel conversion to commonhold.

Standardisation of documentation

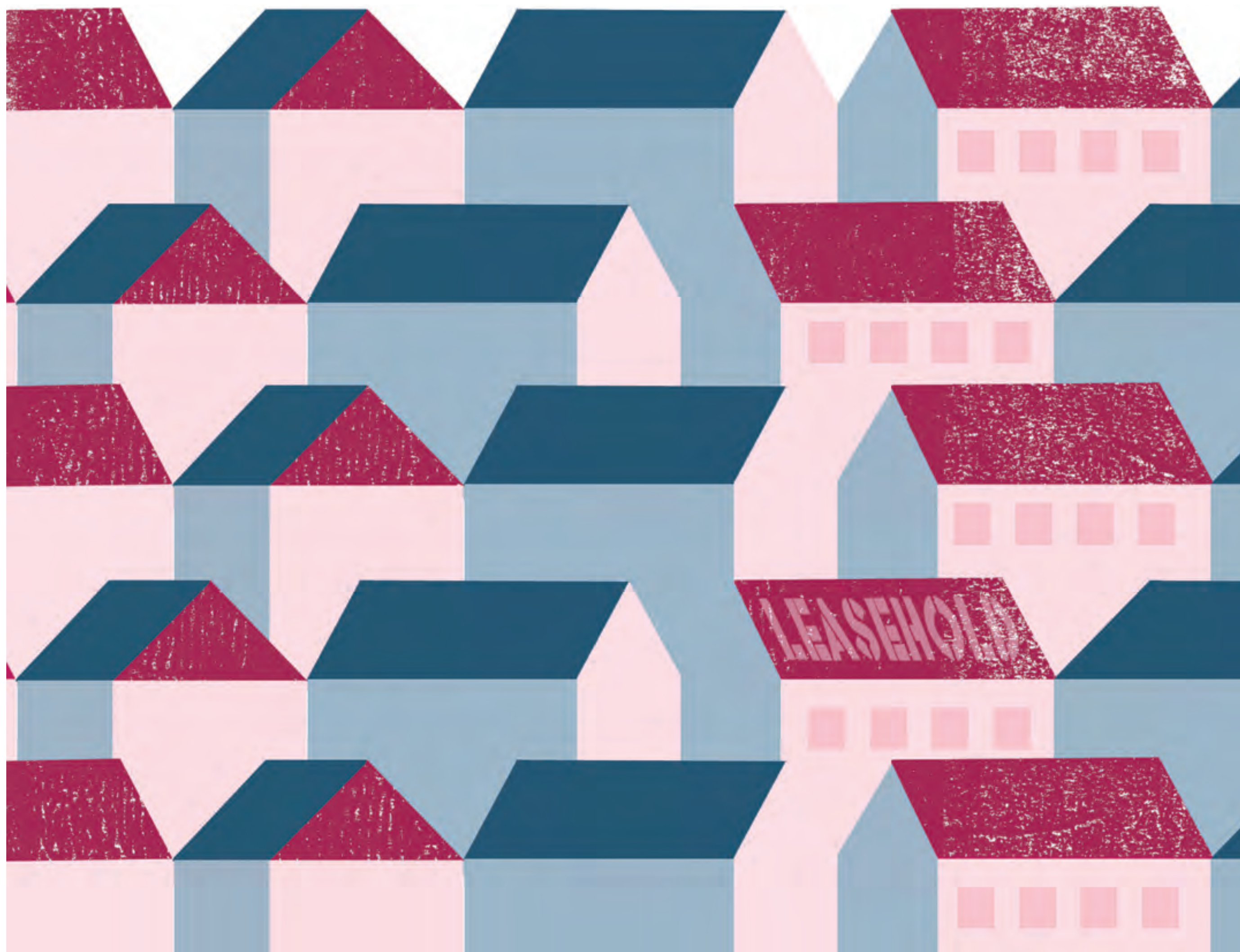
Standardising documents like the Commonhold Community Statement (essentially the rulebook of the association) and the constitution of the commonhold company could reduce legal complexity and costs associated with drafting bespoke agreements for each development.

Mixed use developments

Mixed use development is seen as particularly problematic in the context of commonhold. To address this, the Law Commission recommends a new tool, 'sections', that will enable developers to separate out the management of different types of interest, such as residential and commercial. Sections could be used to ensure that only owners within a particular section are able to vote on matters affecting that section, and that only those who benefit from a particular section are responsible for paying for it. However, the existing legislation does not reflect the reality of these different types of interest.

Engagement with lenders

Getting lenders to see the concept of commonhold favourably is probably one of the most important barriers to overcome. The consultation process



showed that lenders do appreciate some of the benefits of commonhold, including:

- the unit holder will hold a non-diminishing asset
- there is no risk of escalating ground rents, and
- commonhold is not subject to forfeiture.

However, some lenders expressed concerns around the approach of valuers to a commonhold unit, particularly early on when there would be so few properties to compare it to.

Educational initiatives

Increasing awareness and training for industry professionals could mitigate knowledge gaps that may deter adoption of commonhold early on. However, if all new developments involving flats were set up on a commonhold basis, then widespread training across the sector would be required, and the necessary knowledge would follow quickly.

Incentives for developers

Providing incentives such as tax breaks, grants or relief from the community infrastructure levies could encourage developers to opt for commonhold structures over traditional leasehold set-ups, though these may not be palatable from a political perspective. Offering stamp duty tax relief for potential buyers in commonhold developments would be another option.

What happens next?

Today there are fewer than 20 commonhold developments in England and Wales. The government has acknowledged that the current legal framework for commonhold is out of sync with modern development methods and is looking to modernise this.

Given prior failed attempts to get the commonhold system up and running on a voluntary basis, it seems that imposing commonhold for all new residential developments is now probable, and the political will is clearly there. Compelling conversion of existing leasehold developments is another matter and subject to several complications, including addressing the existing security in place in relation to units within those developments. Conversions will be costly and complex. However, because of the diminishing value associated with leasehold, new buyers may prefer to make a commonhold purchase, and properties with leasehold tenure may lose value as a result.

The government's mission is to "bring the feudal leasehold system to an end" but as there is no roadmap for that currently, the initial focus is likely to be on requiring all new developments to be commonhold. Ahead of that, there will be a further consultation process and a draft bill. If this is enacted as proposed, then we can expect it to have a major impact on the way property is owned and managed in the future.

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It's not easy being green

Meena Kamath of The Chancery Lane Project outlines how you can drive climate-conscious property transactions

Meena Kamath *is head of built environment at The Chancery Lane Project. Before this, Meena worked as a real estate lawyer at large international law firms, including DLA Piper and Linklaters*

Commercial property clients are increasingly focused on meeting sustainability requirements. This isn't just because they want to do the right thing for the planet; investors and stakeholders are increasingly demanding action as climate change can present substantial business risks. With a likely surge in sustainability regulations by the end of the decade, clients want to be prepared. There is a growing awareness of legal contracts as a critical – though often overlooked – instrument in the fight against the climate crisis and the mitigation of associated business risks.

As a property lawyer, it can be difficult to know what to do in day-to-day transactions regarding climate change. The Law Society is due to publish climate change guidance for conveyancers early next year, but, in the meantime, there are important steps you can take now to help protect your clients from climate risk.

Foundation for climate action

Embedding climate considerations into real estate transactions is a process that requires attention throughout both the pre-contract and transaction phases.

During the pre-contract phase, start by understanding your client's sustainability priorities. Whether at the pitch stage for a new client or in the period between deals for a regular client, it is worth raising the climate question with them. You could ask them if they have net-zero targets, or whether they have climate-related plans that they'd like you to bear in mind. This allows you to tailor your advice appropriately and will build your relationship with the client, showing you value their priorities. Do be careful with the timing of these queries – your client won't usually thank you for raising this in the middle of a busy period. But if timed correctly, you can ensure your client sees you as a key partner on their sustainability journey.

Additionally, it is essential to build your knowledge of climate terminology and issues, as climate concerns continue to impact real estate. Looking ahead, all property lawyers will need to start factoring climate change into their legal advice. Research from The Chancery Lane Project (TCLP) highlights that many private practice lawyers feel underprepared when advising on climate-related matters, so proactively educating yourself can set you apart from competitors (tinyurl.com/2akxw6rz).

Now is the time to start educating yourself on key terms that your clients are probably already familiar with – learn about why scope 3 emissions are harder to reduce compared to scopes 1 and 2, what embodied carbon really means, and so on. Resources like TCLP's glossary (tinyurl.com/48tujcu4), which clarifies climate jargon in legally adaptable ways, or the UK Green Building Council's guides on decarbonisation for the built environment (tinyurl.com/3pvkmmp2) are helpful starting points.

Embedding climate into legal documents

There are several points during a transaction where climate-aligned clauses should be incorporated into your documentation. A useful way to navigate and visualise how clauses can fit into the transaction life cycle is by using the interactive clause selector toolkit, developed by TLT LLP (tinyurl.com/mrxn8xn4).

It is important to conduct climate-aligned due diligence. One common question property lawyers face is whether to conduct a climate search on properties. The upcoming Law Society climate change guidance for conveyancers should provide some pointers on what to consider. However, it is unlikely to mandate whether you should or shouldn't carry out a search – you will need to consider this on a property- and client-specific basis. It would be prudent to at least consider whether a search is required on each transaction and ask each client about their due diligence expectations concerning the legal aspects of climate risk. This is even more important for properties that may be more vulnerable to the physical effects of climate change (such as coastal properties).

Reports on title should reflect climate factors relevant to the property, including flood risk, environmental risk profiles and energy efficiency. If you do choose to carry out a climate search, you should include standard wording in your report on title, such as TCLP's Marni's clause (tinyurl.com/p2tvdwpy). For the acquisition of an operational investment asset, you should also report on any climate terms in existing documents, such as leases or property management agreements.

Incorporating climate-aligned clauses into transaction documents can play a significant role in advancing sustainable practices in real estate deals. Development documents for projects, particularly those with substantial urban impact, provide an opportunity to include climate clauses tied to circular economy principles and sustainable on-site practices. For example, TCLP's Aatmay's clause addresses circular economy strategies (tinyurl.com/55shzy4w), while Ashkan's clause offers guidance on sustainable practices at development sites (tinyurl.com/42acccez). The NEC's X29 clause may provide additional support, particularly in aligning project requirements with climate-related goals (tinyurl.com/4kfhdmu5).

Letting documents, such as new leases or renewals, present another chance to adopt green lease provisions. The Better Buildings Partnership's *Green Lease Toolkit* is a valuable resource, offering a range of adaptable clauses from light to dark green (tinyurl.com/s68589t4). Updated in 2024, with widespread industry support and collaboration, this toolkit supports the inclusion of sustainability-focused provisions in bespoke commercial leases.

Financial documents can also support

climate initiatives, even if your firm is not directly advising on financing aspects. For clients purchasing with debt, it's wise to check whether the lender has set any sustainability metrics. Sustainability-linked loans often involve such metrics, and some lenders may require climate-related disclosures as part of the certificate of title. TCLP's Tomas's disclosure checklist can ensure that certificates of title meet lender expectations for climate transparency (tinyurl.com/4kmx3rtp).

Sustainability regulations

Although a property lawyer will not typically advise on this, it's important to be aware that sustainability regulations are constantly evolving. With the Corporate Sustainability Reporting Directive (CSRD) and the Corporate Sustainability Due Diligence Directive (CSDDD) on the horizon, contracts could help businesses prepare for and comply with these changes by putting certain requirements into effect. Both directives aim to improve corporate accountability and transparency, but the CSRD focuses on reporting, while the CSDDD emphasises due diligence in sustainability. Asking your clients whether they have considered these directives or need any legal support can provide opportunities for bringing in other experts in your firm.

Advised emissions

It's worth noting that increasing attention is being paid to "advised emissions", explored in more detail in the April 2023 Law Society climate change guidance (tinyurl.com/5n8vyvwf). Briefly, it's the idea that a law firm's greatest emissions come not from heating or cooling their building, or business travel, but from emissions associated with matters on which a solicitor provides legal advice. Acting and advising in a more climate-conscious way can help to reduce your firm's advised emissions, which are likely to come under greater scrutiny in the coming months and years.

Conclusion

As lawyers, we are not qualified to opine on valuation or report on the science behind climate change. However, it's appropriate for us to factually identify where the negative effects of climate change could potentially affect value. This is similar to how we already assess risks such as flood exposure, environmental hazards and other technical risks in our legal advice. It is possible – and necessary – to identify and advise on climate risk without stepping outside the boundaries of legal advice.

Taking some of the steps outlined in this article can lead to a more holistic, value-added client-lawyer relationship. These steps are not comprehensive, nor do we suggest that you do them all; your advice must always be client- and asset-appropriate. However, it's important to recognise that the role of a property lawyer is evolving, and even without doing something radical, we can help to mitigate climate risk for our clients and ourselves.

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Points of view

Philip Askew and Tessa Bonser consider, from both a private client practitioner and property practitioner perspective, whether it's necessary to obtain a grant of probate on a first death if there is a will trust on the title of a property

Philip Askew *is a partner in the private client property team in Stone King's real estate group, and was a member of the Law Society Property Section committee from 2015 to 2023*

Tessa Bonser *is the lead for estate planning and trusts at Stone King. She is a full member of the Society of Trust and Estate Practitioners and the Association of Lifetime Lawyers*

There is some debate among lawyers whether there should be a grant of probate in place for the earlier deceased co-owner(s) of a property when it comes to selling when the last co-owner dies. Here we consider the views of both a private client practitioner and a property practitioner.

Private client practitioner view

A grant of probate is the legal document which confirms the executors named in a will have the legal authority to deal with the assets of a deceased person. But what does that mean in practice?

If a person pays money due to the estate to the persons named on the grant, they are protected against any future changes in entitlement – they know the last will has been proven by the Probate Registry – and from having to check that the funds are correctly distributed by the executors to the beneficiaries.

Conversely, if someone does not pay to persons named on the grant, they are at risk of a claim if a more recent will is found and/or they have paid the money to someone who isn't entitled to it.

Some institutions, such as HM Land Registry (HMLR) and Share Registrars, will insist on a grant whereas others are not so strict. However, where a grant is requested by an institution, the executors will be obliged to get one. But what happens where the estate can be dealt with without a grant and that estate includes a will trust?

Wording

The first thing to check is the wording of the appointment of the trustees. Some wills appoint trustees of a property trust straightforwardly and where this is the case, the will "speaks from the death of the testator" (Wills Act 1837, section 24). The executors' and trustees' authority stems from the will (not the grant) and they are entitled to start dealing with estate / trust assets immediately.

However, in some wills it states that the persons named on the grant will be the trustees of any will trusts. Where this is the case, it is clear that a grant of probate is needed to confirm who will be the trustees. You cannot act without a grant confirming who the trustees are.

Even though the will speaks from death, without submitting the will to the Probate Registry (with attendant promises such as it being the last will) there is a risk that another will could be found and/or that the executors / trustees are not validly appointed because of, say, a defect in the will itself. It is best to tread carefully where there is a will trust but no grant.

Obtaining a grant

While it's best practice to get a grant, some banks and other institutions are increasingly paying out more money without requesting sight of a grant, and therefore many people are deciding against applying for one. This has not been helped by the long delays at the Probate Registry and a general apprehension among the public of having 'to get probate'. In most cases, obtaining a grant where assets are straightforward and there is no tax to pay should be simple and should not take long. One common situation where executors are not getting a grant is where a couple – H and W – hold property as tenants in common and include life interest trusts in their wills over the property, with everything else to the survivor. H dies first, and on his death there might be no practical need to get a grant. Legal title in the property vests automatically in W as the sole surviving joint tenant of that legal title (albeit there should be a Form A restriction on the title) and any liquid assets in joint names will automatically go into W's sole name.

In this scenario, W holds one-half of the legal title to the property for herself and the other half on trust for the trustees of the will trust. (Note that this arrangement over the property is a registerable trust for the Trust Regulation Service, but that is another topic.)

In this situation, the executors can try to avoid having to obtain a grant either by waiting for the second co-owner to die or by transferring the legal title into the names of the surviving legal owner and the trustees named in the will – often the surviving spouse along with any adult (step) children or remoter relatives. It's worth noting that sole surviving legal owners do not have to agree to put trustees' names on the title with them. The trustees can be protected by the use of restriction on the title to evidence the existence of the trust.

The situation can continue like this – but what happens on the death of W or if W or her attorneys want to sell on her behalf?

If the property is in W's sole name, W would need to appoint an additional trustee for the sale. If the property has been transferred into the names of W and the trustees, a sale is straightforward, as there are more than two persons for the capital receipt. If the sale is on W's death, it will be by her executors under a grant of probate for her estate. Under any of these options the Form A restriction is 'overreached', the sale can take place and the purchasers are protected.

Once the legal title is established and paid to the legal owners, there is still the question of equitable interest. The basic position is set out in the Law of Property Act 1925. Here, a disposition of an equitable interest under a trust of land "must be in writing"

(section 53(1)(c)). In the strictest sense, to deal with H's equitable half interest in the property, his executors would need to assent in writing to the vesting of the half share in the trustees (who may be one and the same but who also may be different). The trustees would then have the equitable right to receive the net proceeds of sale and deal with them according to the terms of the trust.

Legal entitlement

The issue of needing a grant arises as the trustees of the legal title of the property (those named at HMLR) must be satisfied that they can distribute the proceeds of H's half to those legally entitled. In the absence of a grant, there is no formal document of legal entitlement other than the will itself.

Some may take the view that the will speaks from death and that the trustees named in the will can be paid, without any need for a grant. However, caution is needed here; if the net proceeds of sale are paid out and a grant or later will emerges showing different parties as executors, trustees and even beneficiaries, this will have to be reported to insurers. You will then need to show the insurers that you could have insisted on a grant protecting your paying the proceeds to those named in a proved will, but you decided not to. This would leave the firm in a very difficult position.

As outlined above, it is possible to establish the legal title without the need for a grant, even where there is a trust behind the title. It could be argued that if proceeds are paid to the legal owners, leaving it to them to apply proceeds correctly, the liability ends there, and any alternative approach over-complicates matters.

But if you are on notice of a will trust and/or you have helped your client overreach by appointing a second trustee without checking for the beneficial entitlement behind the title, then you could be at risk of a future claim.

Property practitioner's view

As with private client practitioners, there are opposing views among property practitioners on acquiring a grant of probate. For property practitioners, this disparity of opinion is amplified depending on who you are acting for – buyer or seller.

Acting for the buyer

When acting for the buyer, the property lawyer can take a straightforward view: there is a Form A restriction on title with a surviving joint tenant, and the duty is to ensure the client takes possession free of any underlying beneficial interests. Legal title passes automatically by survivorship and there is no requirement for the first executors to be party to the transfer of legal title.

The buyer, or their lawyer, is on notice of the underlying beneficial interest due to the existence of the Form A restriction, even in circumstances where the first deceased's name has been removed from the title (likely in an effort to 'simplify' matters on a future sale).

The most straightforward approach for a buyer is to apply the doctrine of 'overreaching' to the matter by asking the seller to appoint a second trustee; two trustees give good receipt for the capital and the buyer is free of the underlying beneficial interest.

A buyer's lawyer should make the second trustee appointment a condition of the contract and ensure the wording in the transfer deed is set out in accordance with the requirements of Land Registry Practice guide 24 and section 36 of the Trustee Act 1925.

By adopting the above approach there are two trustees, but you may not know if you are dealing with the correct one. Best practice is to ensure there is a grant of probate and the second trustee is the person named in the grant for the first deceased.

Other matters to consider, more generally, are that one of the buyers you act for may already be a trustee of the trust, even if they are not named on the legal title. There may be conflicts of interest and you will be unaware of these without seeing both grants of probate.

Note that the circ;umstances of the purchase need to be closely examined by the property practitioner before applying the 'overreaching' principle.

Another, more practical, issue is that there may be a Form B, L or N or a more bespoke restriction on the title. The wording must be closely examined, and enquiries raised.

For absolute certainty that the registration will complete successfully, the practitioner must obtain undertakings from the seller's lawyer to confirm that necessary certification will be supplied to address the restriction, along with any RX3 or RX4 form signed by those needing to consent to cancellation or withdrawal of the restriction.

Without seeing a grant of probate for both owners, or the first deceased if the surviving joint owner is selling, you will not know if you have consent from the correct parties, and HMLR may well requisition your application to ask for such evidence.

With HMLR still experiencing significant delays in processing applications, trying to obtain this information and evidence retrospectively will be problematic.

Acting for the seller

As we have seen, when acting for the seller, a much more cautious approach must be taken.

The Form A restriction, coupled with any more detailed restriction, means the practitioner is aware there are separate beneficial interests.

If there is a surviving joint owner acting via a lasting attorney, you may be asked to evidence that the parties to the transaction and the donor of the lasting power of attorney all had beneficial interests that had not passed to third parties. A practitioner could not provide any warranties without seeing the grant of probate and will of the late co-owner.

In replies to completion information and undertakings in Form TA13, there is an undertaking that you are acting for the true seller. Can you provide that undertaking without knowing you have fully investigated beneficial ownership and trustees with responsibility for receipting funds? We would suggest the answer is no.

In acting for the seller, there is the risk that having paid all the net proceeds of sale to the surviving co-owner, you find that you are telephoned a few days later by the trustees querying why they were not paid. It would be difficult to disentangle such a situation and the firm's insurers would have to be involved.

As a result, it's always best to obtain a copy of the death certificate, will and grant of probate in the late co-owner's estate and ensure that matters are fully investigated. This will ensure you are not, unknowingly or unseeingly, participating in anything underhand.

Practitioners do have a duty to act in the best interests of their clients, and their clients are those with a beneficial interest in the property as well as the legal trustees. The only way to fulfil that duty and ensure you are fully protected is by obtaining a grant of probate, will and death certificate.

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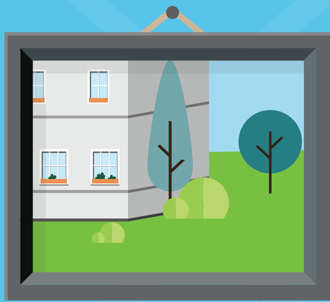
CON29DW: The Full Picture



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