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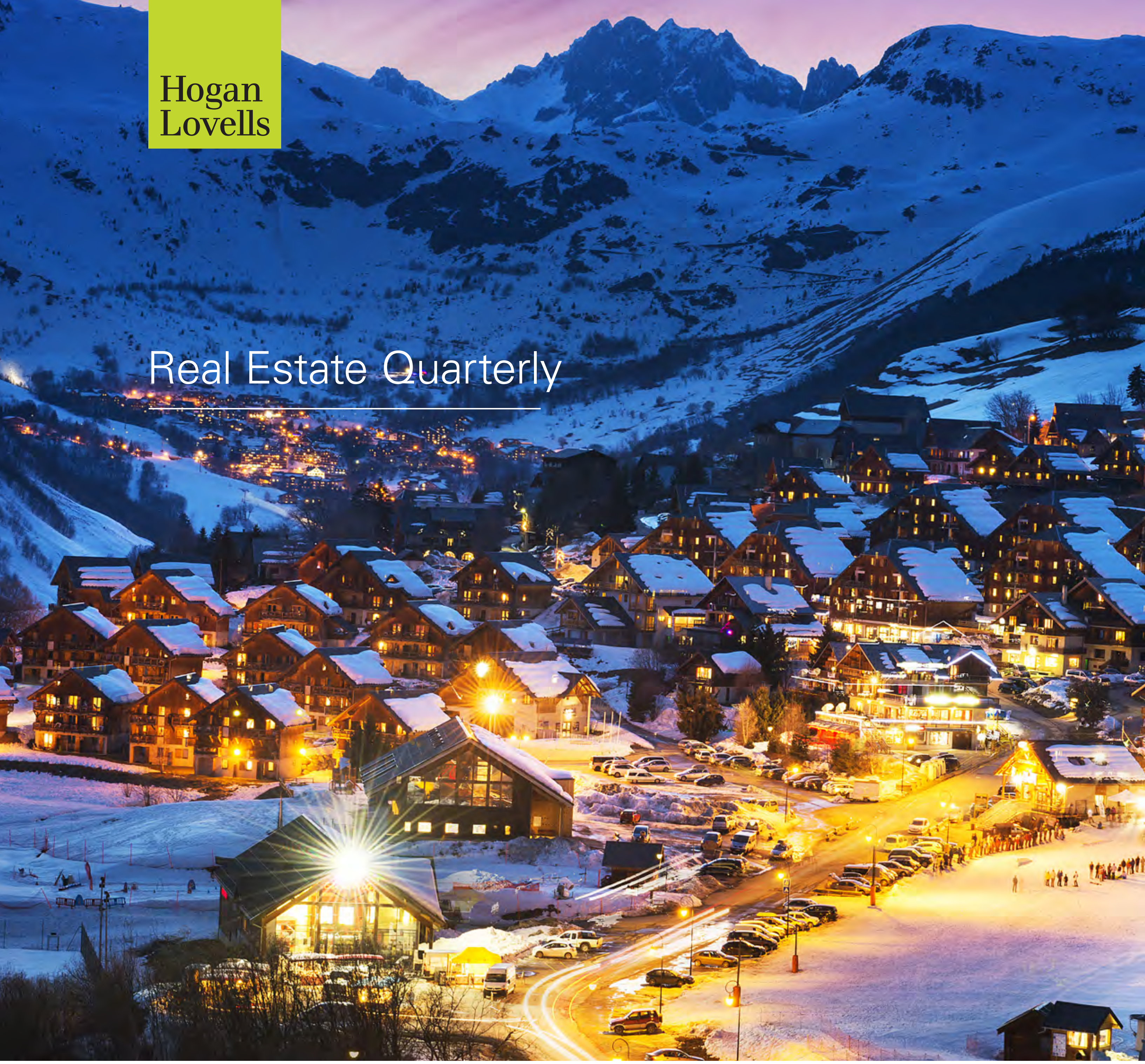

Real Estate Quarterly

WINTER 2015

Contents

Law of unintended consequences

The regime for commercial rent arrears recovery has been in force for over a year, but are the changes working? Mathew Ditchburn examines how landlords' concerns have played out.

More than a year has passed since sweeping changes to the landlord's right to use bailiffs to collect unpaid rent were introduced through the commercial rent arrears recovery (CRAR) provisions of the Tribunals, Courts and Enforcement Act 2007. At the time of its introduction in April 2014, landlords expressed concern over the potential effect of a number of CRAR's features. The Ministry of Justice committed to a review after 12 months to identify any unintended consequences of the new process. Over one year on, have the landlords' worries proved founded?

A key concern

Probably the most contentious element of the new regulations is the requirement to give tenants seven days' clear notice before an enforcement agent (which the landlord must instruct to exercise CRAR) attends and takes control of any goods at the premises in respect of unpaid rent. Landlords are concerned about the potential for a tenant to abscond with the goods during the notice period, denying the landlord the opportunity to secure the tenant's assets in lieu of the debt. Experience since April 2014 suggests that, in fact, the service of the enforcement notice has not led to a marked increase in tenants "doing a runner". Indeed, the majority of tenants served with a notice have paid within the notice period. However, a different consequence has arisen. Some tenants treat the notice as a week's extra time to pay, with the landlord unable to act until it has expired. The driver behind this would appear to be the fact that the statutory fee payable by the tenant to the enforcement agent at the notice stage is fixed at £75 regardless of the value of the debt. This, arguably, gives larger operators an unfair advantage – a small company or sole trader with a low-value rent suffers the same initial penalty as a national multiple. The fees that apply if an enforcement agent attends the premises to take control of goods (by entering into a controlled goods agreement) once the notice has expired are set at approximately 7.5% of the debt, which is clearly a very strong incentive for tenants to pay within the notice period. Notably, landlords have seen a number of regular, repeated uses of this unofficial "overdraft" by the same tenant companies. Frustratingly, landlords have no easy means of accelerating the process with such repeated cases, and alternative remedies can take even longer.

Other issues

A further unforeseen consequence is that although the goods in the unit are deemed to be "bound" when the enforcement notice is served, without the initial bailiff attendance to take an inventory, there is no way for the landlord to prove what assets were bound. The tenant may remove goods that were present at the time of the notice before the enforcement agent attends to take control of them. The next major concern for landlords was that CRAR could only be used for principal rent and not for other costs, such as service charge and insurance. Landlords were vocal in their objection to this when CRAR was introduced. Although the rationale for excluding variable (and, therefore, less certain) charges was understood, in reality on-account service charge does not usually vary from one payment to the next, and many leases incorporate an all-inclusive rent where the service charge element never varies.

Concerns justified

Landlords' concerns have proved to be justified, with increases seen in property owners using methods such as county court claims and statutory demands to collect service charge and other debts. At the same time, marketing of High Court enforcement services to the landlord community has become more prevalent over the past year. If one of the purposes of CRAR was to establish a remedy for landlords that was less oppressive to tenants, then it would seem unlikely that the use of these alternative remedies was intended, as they are generally more costly and have further-reaching consequences for tenants than CRAR.

BPF initiative

The British Property Federation (BPF) has contributed to the Ministry of Justice review with recommendations to address these experiences and concerns. In particular, the BPF suggests:

- the fees throughout the process to be a percentage of the arrears, with a fee of, say, 2.5% of the unpaid rent at the enforcement notice stage and 5% at the controlled goods agreement stage;
- that CRAR should be available for debts other than rent – in particular, where those other costs are fixed, for example where the lease provides for an "all-inclusive" rent;

- introduction of a 24-hour notice to attend the demised premises to take an inventory. The landlord would still not be able to take control of goods until expiry of the enforcement notice, but evidence of those goods bound by CRAR would be created. The BPF recognises that this may cause some disruption to the tenant, but believes this is proportionate disruption
- introduction of a "three strikes and you are out" system. This would maintain the status quo with existing CRAR legislation, but if an enforcement notice is served three times under a particular lease, the landlord will thereafter be relieved from the requirement to serve an enforcement notice and be entitled immediately to enter into a controlled goods agreement in the event of any further arrears.

The BPF believes these recommendations maintain the transparency for tenants that CRAR sought to introduce, while bringing some much-needed balance to the landlord's position when dealing with non-paying occupiers of its assets.

An earlier version of this article appeared in Estates Gazette on 26 September 2015 and was co-authored with John Cook, revenue manager at Capital & Regional. John and Mathew are, respectively, chairman and vice-chairman of the British Property Federation's Insolvency Committee.

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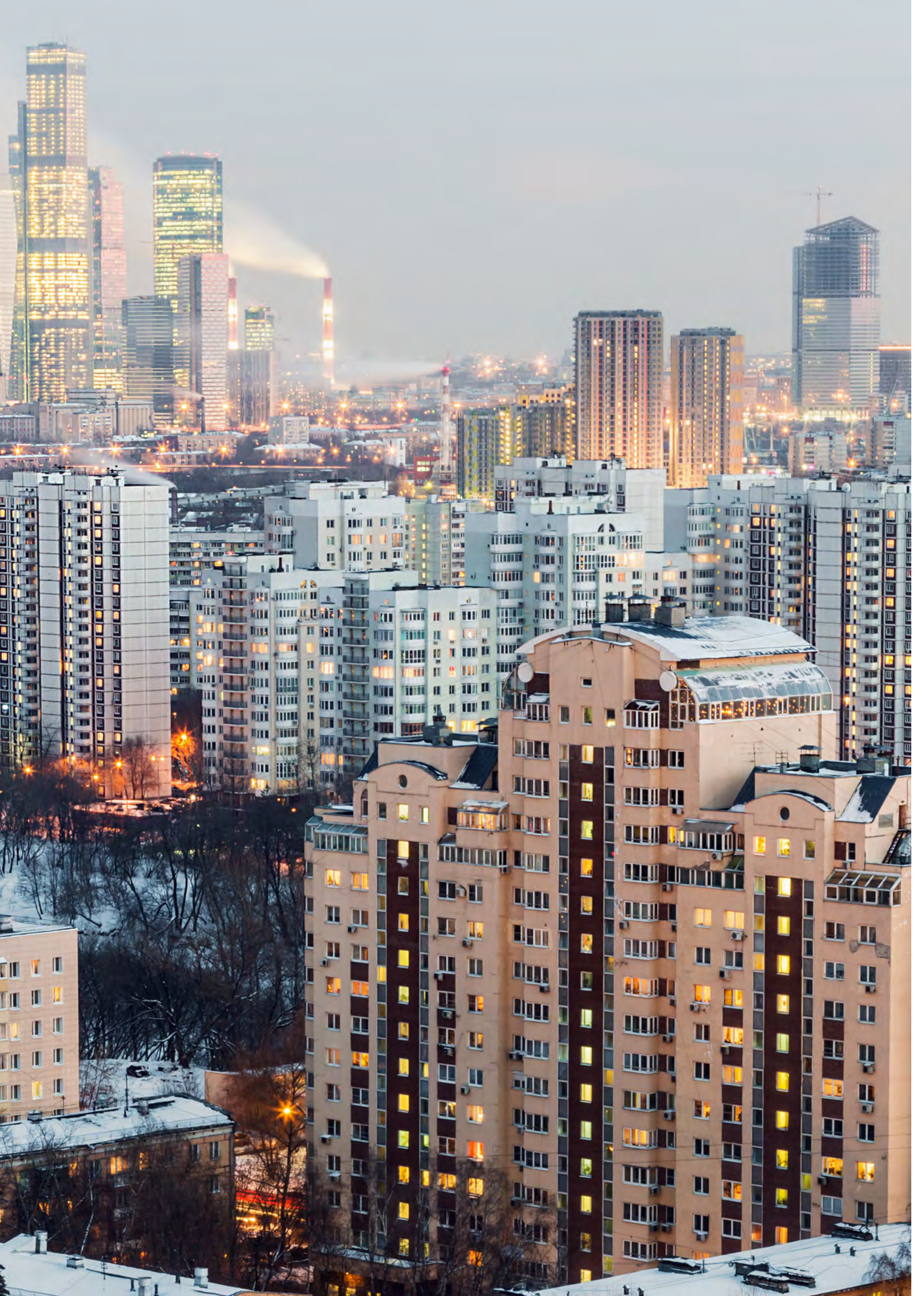

The construction industry scheme: A wolf in sheep's clothing?

Chris Hyde and Laura Oliver expose the hidden teeth of a seemingly straightforward scheme designed to collect tax on cash-in-hand work.

Of the tax-compliance challenges faced by commercial landlords, the construction industry scheme (CIS) can seem relatively benign. Yet it is easy for landlords to be lulled into a false sense of security. Belying its outward appearance, the CIS has the potential to derail transactions and, if ignored, can resurface long after completion to bite the unwary tax manager.

Why should a withholding scheme primarily intended to protect tax receipts in the arena of cash-in-hand construction work affect real estate investors? The answer is that the CIS casts a lazy but broad net by catching contractors and "deemed contractors" at the top of the pyramid and electrifying the chains of construction contracts that flow down.

Risks faced by landlords

Difficulties arise when a CIS deduction is not made when it should have been, as there is no easy way of rectifying the mistake. At worst, a considerable period of time elapses before the mistake comes to light and triggers penalties referable to the amount that should have been deducted. Getting it right in the first place is significantly less painful.

Landlords will be most at risk where they contribute towards their tenant's works on the grant of a lease. If the landlord is a deemed contractor, the application of the CIS will generally turn on two key factual questions:

- Is the tenant under an obligation to carry out the works?
- If so, what is the nature of those works?

Specifically are they restricted to ordinary fit-out works or will they benefit the landlord (for example, by increasing the value of its reversionary interest)?

Where the tenant is responsible for the works under the letting documents and the landlord benefits from them, then the landlord's contribution will fall within the remit of the CIS.

Those working on letting transactions on a day-to-day basis should be aware that the CIS requirements cannot be circumvented or ignored. Deliberately evading the CIS may even give rise to penal consequences for the individuals involved.

Excuses, excuses

It is not uncommon for tenants to make creative assertions that the CIS can be disregarded – unsurprising, given that the compliance risk falls solely on the landlord. Suggestions that should be given short shrift include:

- CIS does not apply because the tenant, as subcontractor, will be occupying the property itself: The exemption for "own build" work applies to a deemed contractor paying for work to its own business premises, not on a payment to someone who has agreed to commission works to the property they are renting, with someone else paying.
- The contribution is only an inducement to enter the lease, not payment for works: Provided the tenant is obliged to carry out (or is otherwise answerable for) the works under the letting documents (and assuming the works go beyond fit-out), CIS applies regardless of what the payment relates to (save for exceptions for building materials, which should be applied with caution, and payments relating to separate works that do constitute pure fit-out).
- CIS is irrelevant because we are registered for gross payment: The landlord itself must verify the tenant's CIS status with HM Revenue & Customs (HMRC).
- CIS does not apply because the tenant is only arranging the work, not undertaking it: "Sub-contractor" includes anyone who is responsible for construction works under the letting documents, regardless of whether they are actually undertaking them.

One long-established practice that does not fall foul of the CIS is where the tenant is compensated for works by a rent-free period. As a matter of law, the CIS applies only to "payments" (though guidance indicates that HMRC may not always agree). It is doubtful that a landlord could be said to have made a "payment" merely by agreeing an initial rent-free or reduced-rent period.

Taming the wolf

Recouping CIS deductions from HMRC can involve considerable delay for tenants. It is seldom practicable for tenants to obtain gross registration status, allowing 0% deductions, within an acceptable timeframe. Even where the timeframe is viable, tenants may be resistant to the level of personal information required from directors in order to complete the application. It can be worthwhile, however, to have discussions with the tenant about the impact caused by CIS deductions.

The more basic CIS registration (which requires less information and only minimal effort) reduces the deduction to 20%. If a corporate tenant is required to make its own CIS deductions on payments to those carrying out the works, the deductions it suffers can be offset against the deductions it is required to make.

Finally, if the tenant is a corporate entity that operates a payroll, deductions can by offset against PAYE and NICs liabilities to HMRC. In many cases, the deduction will "wash through" within a month.

Ultimately, landlords must remember that they are legally responsible for applying the CIS correctly and they should manage tenants' expectations accordingly. If addressed at the outset of negotiations, these issues should be uncontroversial. Left unattended, the CIS has a potentially nasty bite.

An earlier version of this article appeared in Estates Gazette on 21 November 2015

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CIS: The bare bones

- Just as PAYE involves employers deducting tax before making salary payments under employment contracts, the CIS involves "contractors" deducting tax before making payments to "sub-contractors" under contracts relating to construction works.
- A "contractor" includes mainstream contractors within the construction sector, but also "deemed contractors" – broadly, anyone with an average annual construction spend in excess of £1m. Many commercial landlords will therefore qualify.
- A "sub-contractor" broadly means anyone who has responsibility for construction works under an agreement. Tenants who are required to undertake works under the terms of their letting will be caught.
- If the contract is within the scope of the CIS, payments are caught regardless of what they relate to (subject to limited exceptions).
- Deductions apply at a rate of 30%, 20% or 0%, depending on the sub-contractor's CIS registration status.

Shale gas – will the new 'fast track' regime live up to expectations?

Claire Dutch and Harry Spurr consider whether the widespread and rapid deployment of hydraulic fracturing will become a reality.

The government's September announcements on planning policy changes to support shale gas extraction have boosted confidence within the industry. Those announcements come in the aftermath of Lancashire County Council's decision in June to refuse consent for drilling at two sites between Preston and Blackpool. This came as a blow both to those within the sector, and to the government, where there is strong support for the widespread and rapid deployment of hydraulic fracturing. The changes announced in September reflect Whitehall's recognition of the local political and procedural obstacles that lie in the way of this objective. In this article, those measures are examined, and their implications considered.

Perhaps the most significant change in the package is the creation of a new regime to monitor the speed at which councils determine shale gas applications, and to take matters out of the hands of those whose performance is deemed unsatisfactory in this respect. Much like existing rules that apply to certain other planning applications, the system will require councils to decide more than 50% of shale gas proposals within the statutory determination period (or such other period as may have been agreed with the developer in a given case) or risk losing control of decision-making. Monitoring will be carried out annually, and where councils consistently fail to meet deadlines they will be "identified" as underperforming. In such cases Communities and Local Government Secretary of State, Greg Clark will actively consider calling in, for his own decision, further shale gas planning applications. Underperforming councils will be excused in two sets of circumstances – where they can demonstrate that exceptional circumstances have affected the speed of decision-making such that it would be unreasonable to treat their performance as unacceptable, and where the number of shale gas applications determined during the year in question is no more than two.

Among the other measures announced was a change in the Secretary of State's policy on recovering planning appeals for his own determination; the result is that the final decision on a greater number of shale gas appeals will now be made by the minister. This policy change, which will remove decisions from the hands of councils and reflects the government's determination to influence more closely the deployment of projects, will take effect for a period of two years, after which it will be reviewed.

Meanwhile, a separate statement from Environment Secretary, Amber Rudd, also delivered in September, contained three important further matters.
First, in order to assist councils to deal with shale gas development proposals "as quickly as possible", they should adopt timelines agreed in advance with applicants, and use Planning Performance Agreements where appropriate. In addition, where possible, LPAs should save time by leaving certain issues to other regulatory regimes.

Second, the statement indicated that appeals – whether against the refusal of planning permission or non-determination – will be "prioritised" for urgent determination.

Third, it included confirmation that permitted development rights will be amended to allow borehole drilling for groundwater monitoring, and that consultation will take place on further changes to allow drilling for seismic and mine works investigations.

So what is the purpose of these changes and how effective will they be?

This government has been a supporter of shale gas extraction for some time – most actively since May's general election, but also when in coalition during the previous parliament. As long ago as January 2014 the Prime Minister is reported to have said that the then government was "going all out for shale", almost exactly a year before Chancellor George Osborne wrote to colleagues in the coalition cabinet urging action on various measures to promote hydraulic fracturing. Nonetheless such an approach has not been entirely uncontroversial. It appeared to run contrary to the instincts of the Liberal Democrat coalition partners, and indeed exposed tensions within the Conservative party itself, where many MPs and much grass roots support has been, and remains, opposed for environmental and other reasons.

Accordingly, legislative and policy developments have sought to strike a balance between open encouragement and effective support on one hand and, on the other, appropriate protection for environmental and other interests. So, for example, July 2013 saw the introduction of policy to encourage councils to include in their local plans policies for shale gas whilst, at the same time, emphasising the importance of restoration and aftercare provision. Similarly, a relaxation of planning application notification requirements in early 2014 was followed by increased policy protection for sensitive areas such as National Parks and Areas of Outstanding Natural Beauty.

But this most recent set of changes represents, perhaps, the most overtly supportive measures introduced in recent years. This more positive stance almost certainly reflects two factors: first, the departure from government of the Liberal Democrats, and their restraining influence in this context; second, government and industry-wide frustration with events in June concerning Cuadrilla's proposals for development in Lancashire. According to Clark, the objective is "to enable planning applications and appeals to be dealt with as quickly as possible". Indeed the government's own website described the new arrangements as akin to a "fast track" system. Fast track or otherwise, a number of points emerge.

The most obvious is that the industry will welcome the measures. By allowing decision-making to be taken out of the hands of councils – where local political influence is often decisive in respect of controversial developments, whatever their merits in proper planning terms – the new system will go some way towards addressing the frustrations of companies such as Cuadrilla over the attitude of local government officers and committee members towards shale extraction. Equally, measures to accelerate the speed at which appeals are determined will be warmly received. Dilatory decision-making by councils is the enemy of all development proposals; further slow progress at the appeal stage – not uncommon in complex and controversial cases – is particularly damaging.

More significant, however, is that despite such changes, it is clear that the new arrangements fall some distance short of creating a regime that is truly "fast track", for the following reasons.

First, even at its fastest, it will operate no quicker than existing targets for other forms of development. The universal statutory determination periods

will continue to apply to council decision-making. Meanwhile, Cuadrilla's Lancashire appeals are now scheduled to be heard in February, around nine months after the refusal of planning permission. Expect the decision to follow after a further delay. Even discounting the (surely not inconceivable) prospect of a High Court legal challenge to the result, it would be unrealistic to describe such a timeline as anything approaching "fast track".

Next, the mechanics of the designation system will in practice continue to permit substantial delay. This is because it is a blunt instrument: council performance is to be assessed annually only; there will be exemptions for councils in receipt of no more than two applications each year (surely in practice the vast majority) and those with convincing reasons for under-performance; and the rules offer merely the possibility of recovery by the Secretary of State, together with no guarantee of an expedited process once matters are in his hands. Despite this, the government's intention is that the mere threat of designation should encourage expedition by councils, but it remains to be seen how councils will in practice respond to such an incentive in circumstances where the local political context is often so challenging.

Further, whatever the speed of the decision-making process, there can be no guarantee that approval rates will rise. Irrespective of the incentives to encourage expedition on the part of councils, three things are clear. The first is that shale gas development will continue to be controversial. The second is that the majority of applications will continue to be determined by councils. The reality of development control at the local level is that unpopular projects often run into trouble because planning committees find it difficult to grant consent for political reasons, whatever the merits of the proposal in question. The new arrangements will do little to address this, not least because they allow councils to be judged only on the speed of their decisions, and not, unlike the rules that apply to certain other forms of development, their performance in defending such decisions at appeal. The third matter is that, even where the Secretary of State takes over decision-making, his capacity to grant permission and facilitate delivery will be limited by the usual factors: – development plan policy; material considerations; and the increasing tendency of objectors to frustrate controversial development by challenging decisions in the courts.

Despite all this, however, the shale gas industry will welcome the changes announced. At the very least, they represent a clear endorsement of shale gas as a technology, and a positive statement of support for the future role of shale gas in the UK's energy sector. Further, it is not inconceivable, should evidence of a more efficient and balanced approach to decision-making by LPAs not emerge in due course, that we will see further changes, both policy and legislative. September's announcements might be seen as a signal of the government's willingness to engage in future interventions should it become necessary to do so.

It is also worth noting that Whitehall's more positive approach to shale gas development appears at odds with the increasingly restrictive policy context in which renewable energy development proposals are determined, such as the new requirement for wind energy developers to win the "backing" of local communities. This is a matter of controversy in some quarters.

Finally, the government's determination to extend its control over the planning process for shale gas developments contrasts sharply with two factors. These are the recent calls from the Independent Task Force on Shale Gas for increased community engagement, and, more generally, the concept of localism introduced by the coalition government. Against this context developers will need to remain conscious of the desirability of maintaining their social licence to operate, and of the importance of boosting public confidence levels in the industry.

Timeline showing shale gas legislative and policy developments

July 2013
Guidance published:

- LPAs to make provision for shale gas extraction in local plans.
- List of issues for LPAs to consider when determining applications.
- Pre-application engagement important.
- After care and restoration important.

October 2013
European Parliament proposes to amend environmental impact assessment law so that all shale gas proposals, irrespective of size, require EIA, but seemingly elects not to.

Early 2014
Procedural changes:

- Introduction of standard planning application form for shale gas.
- Relaxation of notification requirements.

July 2014
Policy on shale gas amended, e.g.:

- Minerals Planning Practice Guidance amended to confer greater protection on sensitive landscapes and sites (National Parks, AONBs, WHSs etc.).
- So SoS to "give particular attention" to recovering shale gas appeals.

February/July 2015
Infrastructure Act 2015/Onshore Hydraulic Fracturing (Protected Areas) Regulations 2015 – increased environmental protection, and rights of access.

- Prohibition on shale gas less than 1000m below ground.
- LPAs must consider environmental impact, including cumulative.
- Increased protection for groundwater sources, AONBs, NPs, WHSs.
- Right to drill (300m minimum depth) under private land introduced.

August 2015

- Joint CLG/DECC statement, followed by written statements from Amber Rudd and Greg Clark:
- New regime for underperforming LPAs.
- LPAs encouraged to determine applications promptly, to use PPAs, and to save time by leaving non-planning matters to other regulatory regimes.
- Appeals to be prioritised.
- Appeals recovery criteria amended for two years to include shale gas appeals.
- SoS to actively consider calling in planning applications.
- PD rights to be introduced to allow borehole drilling; consultation on further PD rights to allow seismic investigation.

An earlier version of this article has been published in Utilities Law Review.

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Supreme Court issues landmark judgment on penalty clauses

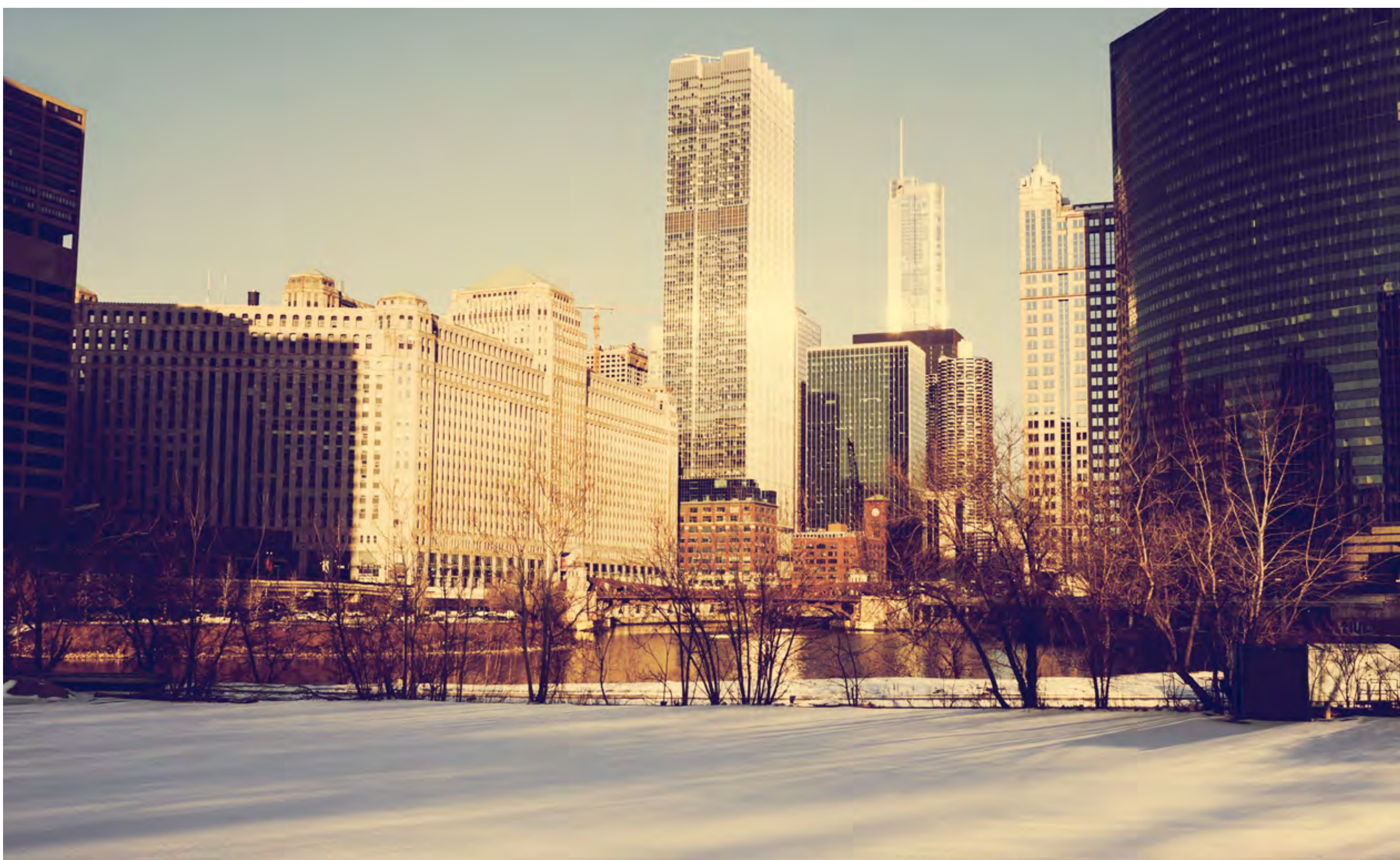
Businesses will now be more confident in providing for a pre-determined consequence for breach of contract, unless that consequence is wholly disproportionate. The judgment strongly reinforces the continuing reluctance of the courts to overturn clauses in negotiated agreements between sophisticated parties.

In its judgment in the combined cases of *Cavendish Square Holding BV v Talal El Makdessi* and *ParkingEye Ltd v Beavis* the Supreme Court has formulated a new test for determining if a clause is an enforceable liquidated damages clause or an unenforceable penalty clause.

Liquidated damages and the rule against penalties
It is common practice to include a clause in a contract which specifies that pre-determined compensation (commonly a sum of money or transfer of an asset) is due to the innocent party on the specific breach of the contract by another party. A key concern for these clauses is whether they are classified as liquidated damages or penalties. The cases concerned three different forms of contractual compensation for breach: withholding of payment (withholding clause); transfer of an asset (forced transfer clause); and payment of a fixed sum, such as £X is payable by party A if party A breaches clause Y (classic clause).

The *Cavendish* case and the *ParkingEye* case are the latest in a series of high profile cases which examine the difference between liquidated damages, which are enforceable, and penalty clauses, which are not. In these two cases the Supreme Court was asked to re-examine the long-standing rule against penalties to determine if it was fit for purpose and whether it should be extended or dispensed with entirely. The Court decided not to abolish the rule, but it did significantly narrow its scope.

The new test for penalties
Although acknowledging that the rule against penalties, originating in the *Dunlop Pneumatic Tyre* case of 1915 and developed in subsequent case law, was an "ancient,



haphazardly constructed edifice which has not weathered well", the Supreme Court decided to retain the principle but stated that its scope should not be extended. In this landmark decision, the Supreme Court took the opportunity to formulate a new test for determining if a clause is a penalty. This new articulation of the test emphasises: (i) determining the legitimate interests of the innocent party which are served or protected by the relevant provision, and (ii) assessing whether the clause is out of all proportion to such interests.

The New Test:
"The true test is whether the impugned provision is a secondary obligation which imposes a detriment on the contract-breaker out of all proportion to any legitimate interest of the innocent party in the enforcement of the primary obligation."

"The first step is to consider whether any (and if so what) legitimate business interest is served and protected by the clause... and secondly, whether the provision made for that interest is extravagant, exorbitant or unconscionable?"

In a significant change to the previous law, the Court commented that the concept of deterrence is unhelpful when assessing if a clause is penal and, significantly, noted that "deterrence is not penal if there is a legitimate interest in influencing the conduct of the contracting party which is not satisfied by the mere right to recover damages for breach of contract". However the Court did also make it clear that it would not enforce a clause which was simply a disguised punishment for breach.

In addition to the new test, the Supreme Court emphasised that the penalty rule regulates only the contractual remedy available for the breach of primary contractual obligations, and not the fairness of those primary obligations.

Why was the *ParkingEye* appeal heard with the *Cavendish* appeal?
Given the significance of the decisions in the *Cavendish* case and the *ParkingEye* case for the rule against penalties, the Supreme Court heard the two appeals together and issued a combined judgment.

It is worth noting that the new test could apply in both a business to business, and business to consumer context. The *Cavendish* case concerned a business to business contract containing a potential withholding clause and a potential forced transfer clause. The *ParkingEye* case concerned a consumer contract with a classic clause.

In the *ParkingEye* case, chip shop owner, Barry Beavis had a contractual licence to park in a retail park in Chelmsford. The parking terms were set out in notices posted at the entrance, including a two hour limit and an £85 charge if this was exceeded. Mr Beavis overstayed by nearly an hour. The car park was managed by ParkingEye, who demanded payment of the £85 charge. Mr Beavis disputed that it was payable on the basis that it was excessive and therefore a penalty.

The Supreme Court found that the charge had two main objectives: (i) the management of the efficient use of parking space in the interests of the retail outlets and their users by deterring long stay or commuter parking and (ii) the generation of income in order to run the scheme. On that basis, the Court held that both ParkingEye and the landowners had a legitimate interest in charging overstaying motorists even if that extended beyond the recovery of any loss.

The Court went further and said the charge was neither extravagant nor unconscionable having regard to practice around the UK and taking into account the clear wording of the notices.

This doesn't mean carte blanche for car management companies demanding overstay charges. Supreme Court President, Lord Neuberger made it clear that: "None of this means that ParkingEye could charge overstayers whatever it liked. It could not charge a sum which would be out of all proportion to its interest or that of the landowner for whom it is providing the service. But there is no reason to suppose that £85 is out of all proportion to its interests."

What does the combined judgment mean for liquidated damages clauses and the rule against penalties?
The Supreme Court has confirmed that the rule against penalties has very limited application in complex commercial relationships between sophisticated parties of equal bargaining power, particularly where the contract has been freely negotiated with the benefit of legal advice.

Provided that the relevant contractual provision: (i) serves a legitimate business interest(s); and (ii) is not extravagant, exorbitant or unconscionable, it will not be a penalty and therefore will be enforceable. The new test opens the way for parties to specify a pre-determined consequence, even in situations where the innocent party does not suffer a significant or easily quantifiable loss. This suggests that contracting parties will no longer need to consider whether the compensation for breach is a "genuine pre-estimate of loss", particularly as the Supreme Court referred to this concept as "unhelpful". However, it remains to be seen how the courts will determine what is and isn't extravagant, exorbitant or unconscionable, particularly where the contracting parties are not on a level playing field. Also whether the courts in certain circumstances will still look to make some comparison between the value or quantum of damage suffered by the innocent party and the value or quantum of the compensation given by the breaching party.

The Supreme Court's judgment provides welcome clarification regarding the scope of the rule against penalty clauses and its application by clarifying that the rule extends beyond clauses which are not in the classic form. The decision has given welcome clarity that exit provisions in joint venture agreements which are triggered by breach and provide for an innocent party to put shares at a premium or call shares at a discount, i.e. forced transfer clauses, are likely to be enforceable under English law, provided that these provisions serve and protect the legitimate interests of the innocent party and are not extravagant, exorbitant or unconscionable.

The decision demonstrates the English courts' respect for parties' freedom of contract and shows that English courts will seek to give effect to the legitimate commercial interests of parties when interpreting and enforcing contracts. It confirms that the courts will only step in to find that a contractual provision is an unenforceable penalty if it meets the high threshold that it is out of all proportion to any legitimate interest of the innocent party.

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The unstoppable rise of court fees

With the cost of going to court set to rise again, Mathew Ditchburn warns that the property industry will feel the brunt.

The government has confirmed new increases in court fees and published proposals for further rises for money claims as well as new fees for the First-tier Tribunal (Property Chamber) and Upper Tribunal (Lands Chamber). The announcement came soon after controversial fee increases which took effect in April 2015, leading to a hike of more than 660% in some cases.

Confirmed and proposed fee increases
The latest confirmed and proposed new fees are summarised in the table below. Not all of them are big numbers, but they represent a sea change in the way that court users are charged. Some of the new charges will be "enhanced fees" meaning the amount of the fee exceeds the cost of providing the service (the government passed legislation in 2014 to bypass the usual rule that fees for public services should be at cost).

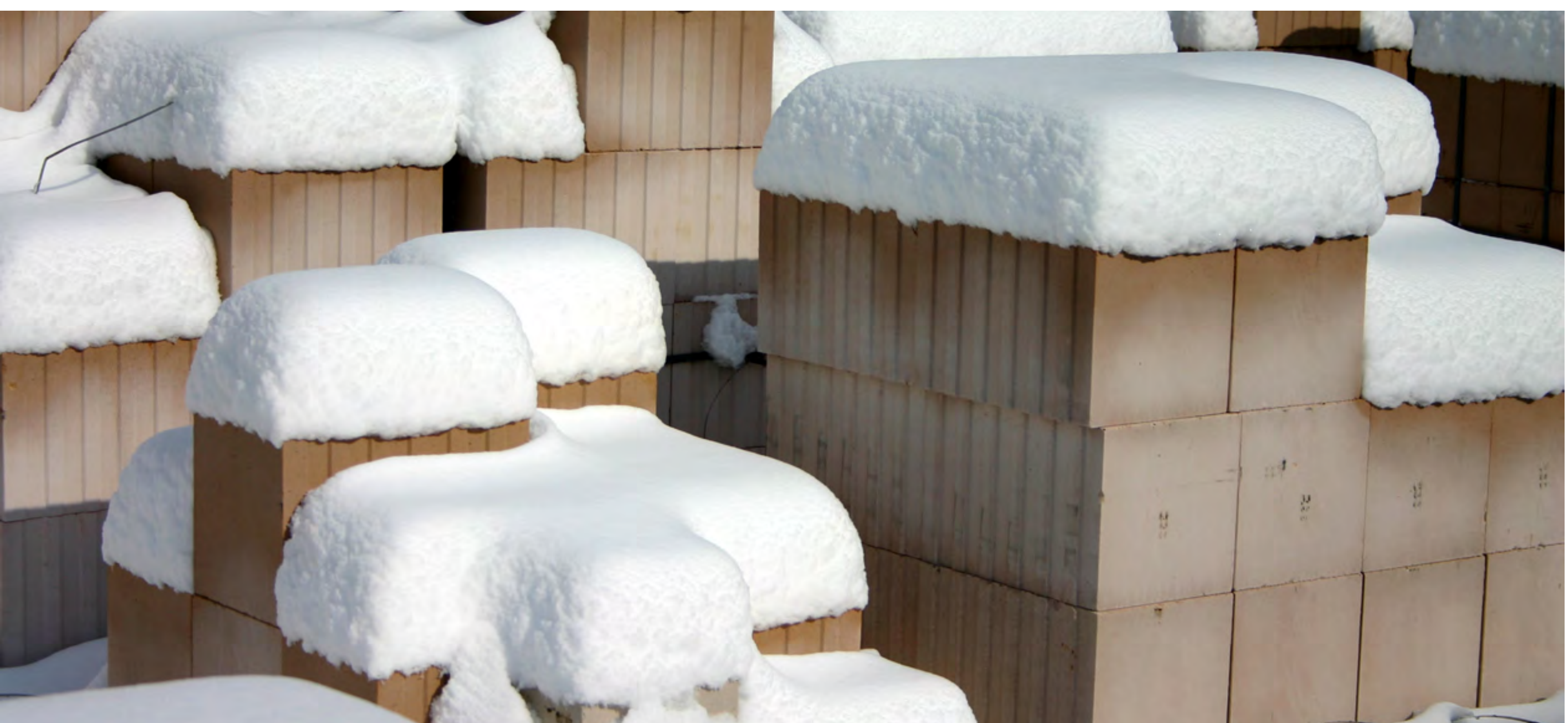
The Ministry of Justice consulted on enhanced fees, including for possession claims, in January 2015. Despite more than 90% of respondents opposing the increases, the government has confirmed that it is nonetheless going ahead with the proposals. The proposed changes were expected to come into effect later this year and produce £52m per annum of additional income, but have not yet been implemented.

As a result of the changes in April this year, current fees for issuing a money claim for more than £10,000 are 5% of the value of the claim, capped at £10,000. Not content with the anticipated annual revenue of £120m that this is set to produce, the government now proposes to increase the cap to £20,000 – which would be payable for claims of £400,000 or more – and have floated the possibility of a higher cap, or no cap at all.

Barrier to justice
Many are concerned that this relentless rise in court fees will have a serious impact on access to justice. Some may simply be unable to afford the upfront cost of starting proceedings.

Claims with a value of more than £200,000 are not necessarily the reserve of high-net-worth individuals or multinational organisations, particularly in the property sector. With property and rental values being what they are, claims for unpaid rent can easily run into hundreds of thousands of pounds. For the landlord, whose cash flow and overdrafts may already be severely stretched as a result of the dispute, a court fee of more than £10,000 could present a real barrier to justice.

Nor are property disputes with a value of £400,000 rare. Dilapidations claims for commercial premises are often of this level or more. An issue fee of £20,000 is likely to prove prohibitively expensive in many cases, particularly when multiplied across several floors of a multilet property, or a portfolio of units.



While the government may hope that the further increase in issue fees will encourage more parties to explore alternative dispute resolution, many claimants find it impossible to persuade the other side to negotiate without first issuing proceedings; parties may also have to issue to avoid being time barred. Having paid a hefty upfront fee, a party may be more inclined to go through with those proceedings to "get their money's worth".

Stealth tax?

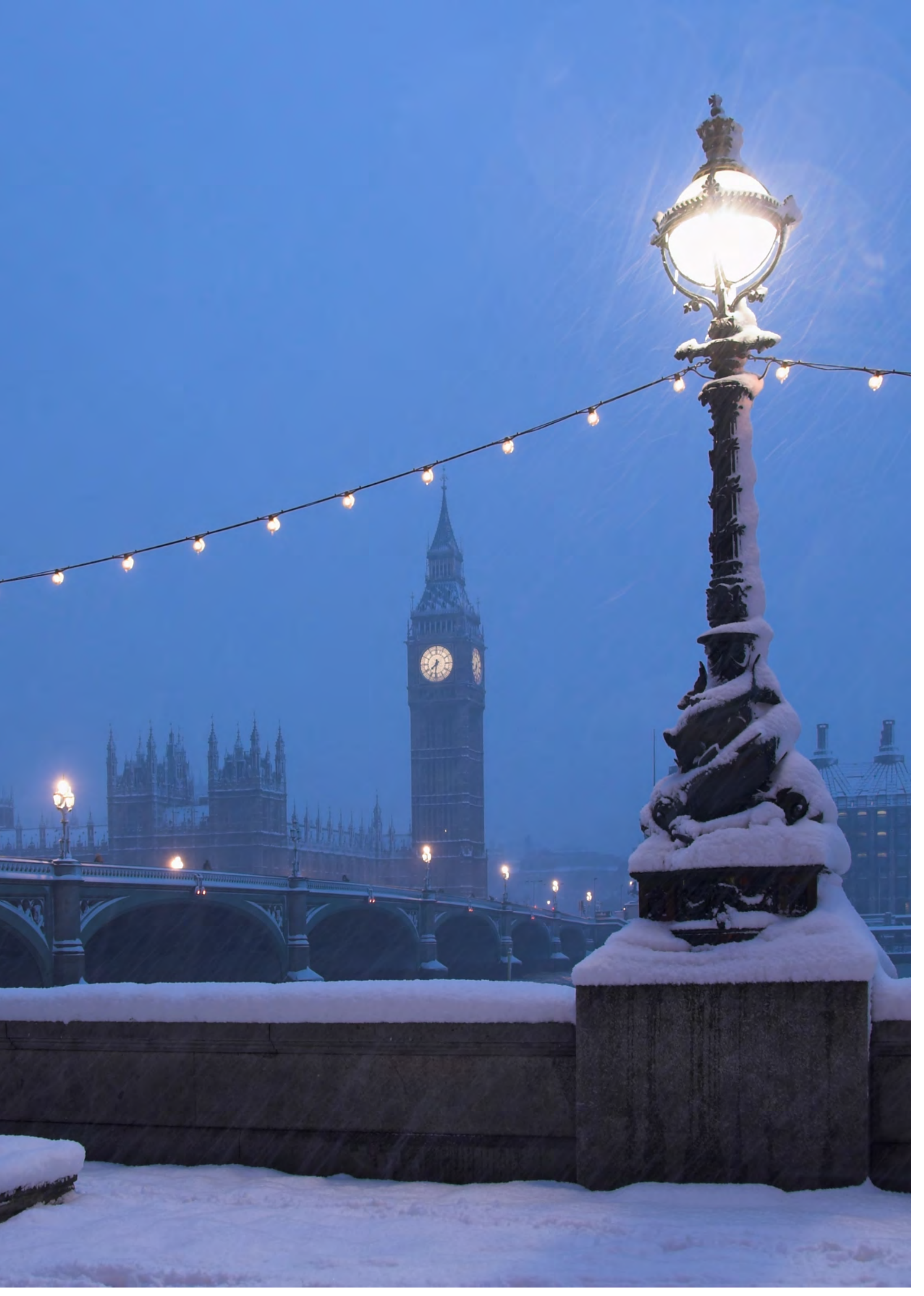
According to the Ministry of Justice, fee increases are needed to help transfer the financial burden of the courts and tribunal systems away from the taxpayer to the court users themselves. If that is the case, a fairer system would be a "pay as you go" approach with fees being imposed in stages as parties progress through proceedings.

Those cases which settle early and take up a relatively small amount of court resources would then pay less than those which proceed all the way to trial.

While the government has pledged to reinvest the income it receives from fee increases back into the justice system as a whole, there is no guarantee that the civil courts will be prioritised. Those paying the fees may just see it as another "tax" for which they get nothing in return in the way of an improved service.

This article first appeared in Estates Gazette on 5 September 2015 and was co-authored with Hayley Harris, a senior associate at Berwin Leighton Paisner LLP. Both Mathew and Hayley are members of the Property Litigation Association's law reform committee.

Type of fee	Increase
Possession claims in county court	Confirmed increase from £280 to £355 (£250 to £325 for online claims)
General application by consent in civil proceedings	Confirmed increase from £50 to £100
Contested application made on notice in civil proceedings	Confirmed increase from £155 to £255
Issue fee for money claims	Still 5% of claim value, but proposed increase of cap to at least £20,000 (up from £10,000)
Other fees in civil proceedings	Proposed uplift of 10% on most other fees, including: • Proceedings for a declaration or injunction. • Assessment of costs fees • Court of Appeal fees • Judicial review fees • Enforcement proceedings
First-tier Tribunal (Property Chamber) fees for all applications except Leasehold enfranchisement	Proposed new flat fees of £100 (issue fee), and £200 (hearing fee)
First-tier Tribunal (Property Chamber) fees for leasehold enfranchisement applications	Proposed new flat fees of £400 (issue fee), and £2,000 (hearing fee). Previously no fees were payable.
Upper Tribunal (Lands Chamber) fees	Fixed 10% uplift on most fees, including: • Rights of light obstruction notice application for temporary/ definitive certificate • Restrictive covenant applications • Hearing of a rating appeal



Q&A

Paul Tonkin considers how Light Obstruction Notices work in practice and Tim Reid and Rob Struckett investigate the tightening of regulations in relation to ASTs.

Q: We are planning a redevelopment. Our surveyors have advised that we serve a "Light Obstruction Notice". What does this mean?

A: Where the windows in a building have enjoyed uninterrupted access to light, without consent, for a period of 20 years then those windows can acquire a right to light. However, that right will be lost and the clock reset, if that light is interrupted for a year or more without objection. The interruption can be a physical one – i.e. a new building, but it is also possible to create a notional obstruction by registering a Light Obstruction Notice under the Rights of Light Act 1959. In simple terms, registering a Light Obstruction Notice is equivalent to creating a physical interruption to the access to light.

Light Obstruction Notices can be a useful tool for developers, as they can prevent neighbouring owners from acquiring rights of light over the development site before the development starts. For example, if the neighbouring building (called the "dominant building") has not yet enjoyed 20 years' access to light over the development site (the "servient building") but will do so in the near future, a Light Obstruction Notice can stop the 20 year period from running and the adjoining owner will be unable to challenge the Notice unless he completes his 20 years' enjoyment before the end of the one year period of interruption following registration of the Notice. In effect this means that the Notice needs to be registered before 19 years' enjoyment of light has accrued if it is to be immune from challenge.

The process of registering a Light Obstruction Notice can be quite involved. The developer will need to apply to the Upper Tribunal (Lands Chamber) for directions. A fee is also payable. The Tribunal will usually direct the developer to serve the application for the Notice on all persons believed to have an interest in the dominant building. This can be a substantial task where the building is multi-let, for example a block of flats. Proof of service must then be provided to the Tribunal who, if satisfied that the directions have been complied with, will issue a certificate with the local authority permitting the Light Obstruction Notice to be registered in the Local Land Charges Register against the dominant building. Once registered, it will remain on the register (unless successfully challenged with a year) and will show up on a Local Land Charges Search against the dominant building. Because this process can take some time, there is also an expedited procedure whereby a developer can register a temporary certificate pending completion of the process, where he can show that the case is one of urgency, because the dominant building is close to acquiring 19 years' enjoyment. The effect of this is to back date the registration of the Notice to the date of registration of the temporary certificate.

Where the owner of the dominant building believes that he already has 19 years' enjoyment of light, he can apply to court to challenge the Notice but this must be done before the Notice has been registered for a year, otherwise it will be too late and any right of light enjoyed over the servient building will be lost.

In short, timing can be critical and early advice should always be sought.

Q: I have various residential as well as commercial tenancies in my portfolio and I have heard that the rules relating to ASTs have recently changed, is this correct? Are the obligations on landlords now more onerous?

A: From 1 October 2015, landlords must use a new, prescribed form of notice when ending an assured shorthold tenancy (AST) granted on or after that date. Additionally, landlords will not be able to recover possession unless they have previously provided certain documents relating to the property and the tenant's rights and responsibilities.

An assured shorthold tenancy is a type of residential tenancy granted to an individual that allows the landlord to repossess the property at the end of the term by service of two months' notice under section 21 of the Housing Act 1988. If no notice is served, the tenant can continue to occupy the property under what is known as a statutory periodic tenancy (with the period usually depending on the frequency of rent payments, whether monthly or annual) until notice has been served.

A significant change for landlords is that they can no longer serve section 21 notices on the date the AST begins, as has been the usual, convenient practice.

Instead, they must wait until the tenant has occupied the property for at least four months before serving a notice. Also, a section 21 notice will expire after six months for a fixed term AST and four months for a statutory periodic tenancy. This means that a landlord will have to wait six months before serving notice to terminate a 12 month AST. This is likely to increase the administrative burden on landlords who are juggling large portfolios of residential properties.

There are a number of other regulatory requirements imposed as part of the government's on-going campaign to regulate more closely landlords of assured shorthold tenants. These include a requirement that, before issuing a section 21 notice, the landlord has to have supplied the tenant with:

- an Energy Performance Certificate.
- a copy of a Gas Safety Certificate.
- a copy of the Department for Communities and Local Government's booklet: *How to rent: The checklist for renting in England.*

Although not mandatory, it would be best practice to supply the tenant with these documents at the start of a tenancy to avoid any delay when later serving a section 21 notice.

For now, these changes do not affect ASTs predating 1 October 2015 or any statutory periodic tenancies arising after the expiry of such ASTs. However, as of 1 October 2018, the regulations (except the provision of a DCLG booklet) will apply universally, regardless of when the tenancy was granted, so landlords are advised to get their house in order as soon as possible.

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Case round-up

Eleanor Stark summarises recent case law

***Magnic Ltd v Ul-Hassan* [2015] EWCA Civ 224**

Tenant granted relief from forfeiture where breach had not caused additional damage

Mr Ul-Hassan was the long leaseholder of ground floor retail premises. His son, Mr Malik, was his sub-tenant under a lease which expired in 2028. Both leases had been acquired by way of assignment and contained covenants not to do anything to breach planning legislation. Magnic was the freehold owner.

In 2006, Mr Malik and Mr Ul-Hassan applied for planning permission to operate a takeaway pizza business from the premises (the premises previously had been used as a bakery). Permission was granted in 2007 subject to conditions which included the installation of a suitable fume extraction system. An application for consent to alter the premises to install the system was made to Magnic who refused it.

The planning condition remained unfulfilled and consequently the permission lapsed. Notwithstanding this, Mr Malik and Mr Ul-Hassan continued to run their pizza business in breach of covenant. In 2009, Magnic served a section 146 notice and shortly after issued possession proceedings. Mr Ul-Hassan and Mr Malik applied for, and were granted, relief from forfeiture on a number of conditions including the requirement to obtain planning permission.

Mr Ul-Hassan and Mr Malik failed to comply with the conditions and Magnic applied for an order for possession. These proceedings were settled on the basis that relief from forfeiture was granted on the condition that Mr Ul-Hassan and Mr Malik ceased trading by 11 February 2011. Mr Malik and Mr Ul-Hassan appealed and continued to trade from the premises.

The appeal was dismissed and Magnic sought and obtained a declaration that the headlease had been forfeited. The judge refused to grant a retrospective extension of time to the date by which the tenants had to cease trading.

Mr Ul-Hassan and Mr Malik appealed arguing that the decision to continue trading had not been a deliberate breach of the condition (as the judge had indicated) and the forfeiture resulted in an unfair windfall to Magnic. The premises could be re-let by Magnic at full market rent and Mr Ul-Hassan and Mr Malik were deprived of valuable assets.

The Court of Appeal found that the judge had failed to exercise his discretion correctly by refusing to extend the date for compliance with the condition. The breach was not deliberate and was based on a misunderstanding of the appeal process. Further, the refusal of relief resulted in an unfair windfall to Magnic which was unjust and disproportionate where the breach was not deliberate (despite the lengthy history of breaches) and the additional months of trading had not resulted in any damage to Magnic.

***Titan Europe 2006-3 PLC v Colliers International UK Plc (in liquidation)* [2015] EWCA Civ 1083**

Valuation was not negligent

On 15 December 2005, Colliers valued a property at Fürther Strasse in Nuremberg on behalf of a bank. The property was used mainly for warehousing and was occupied by a big mail order company. Colliers valued the property at €135 million. Following the valuation, the bank agreed a loan of €110 million secured against the property.

Five months later, the loan was sold to Titan as part of a securitisation package whereby a number of loans were transferred to them and noteholders became the ultimate beneficiaries of the loan and the underlying securities.

In September 2009, both the owner and the tenant of the warehouse became insolvent and the administrators disposed of the property on behalf of the owner for only €22.5 million. Titan issued proceedings claiming that Colliers' 2005 valuation had been negligent.

The judge at first instance found that the true value of the property had been €103 million and Colliers' valuation had been negligent. The property was sufficiently unusual to adopt a 15% margin of error; the €103 million figure was outside the acceptable margin of error. The judge assessed Titan's damages at €32 million.

Colliers appealed the finding of negligence and the decision that Titan was entitled to damages in respect of that negligence rather than the noteholders who were the ultimate beneficiaries of the loan. Colliers argued that the noteholders had actually suffered the loss and had no recourse to Titan in respect of that loss.

The Court of Appeal allowed the appeal and held that the correct valuation was actually €118.3 million, which fell within the 15% bracket for margin of error. Consequently Colliers' valuation had not been negligent. The Court held that Titan had a cause of action against Colliers and any claim by a noteholder could be defeated.

***Creative Foundation v Dreamland Leisure Limited* [2015] EWHC 2556 (Ch)**

Banksy mural on wall held to belong to landlord

Dreamland was the tenant of 44-46 Rendezvous Street, Folkestone under a 20 year lease which demised to it the whole building including structure and exterior. The lease contained a standard repairing obligation and obligation not to "injure or maim" the walls without the landlord's consent.

Around September 2014 during the Folkestone Triennial (a public art event organised by the Creative Foundation), a Banksy mural known as "Art Buff" appeared on the flank wall of the premises. Dreamland removed part of the wall including the mural and made good the damage in order to ship the mural to a specialist art dealer in New York for sale. The freehold owner of the building assigned its cause of action to the Creative Foundation.

The Creative Foundation issued proceedings against Dreamland claiming the torts of trespass and conversion. It applied for summary judgment of its claim for the delivery up of the section of wall bearing the mural. Dreamland argued that it had been obliged or entitled to remove the section of wall in order to comply with its repairing covenants to keep the premises in good and substantial repair and condition. It also argued that there was an implied covenant in the lease which meant once the section of wall was removed it became its property.

The High Court granted the Creative Foundation's application. The Court found that Dreamland's chosen method of "repairing" the wall was excessive and unreasonable where there were cheaper and less invasive methods available. The judge confirmed that every part of the property belonged to the landlord; paint constituted part of the property once it had been applied to the wall. Discharging a repairing obligation does not lead to an implication that a tenant acquires ownership of a chattel created as a consequence of remedying the repair. The Court noted that it is possible that low value items removed as part of a process of remedying disrepair could belong to tenants but definitely not in instances where the chattels created were of high value as in the instant case. Any windfall ought to fall on the landlord and not the tenant.

***Re Fivestar Properties Ltd* [2015] EWHC 2782 (Ch)**

Confirmation of bona vacantia rules for freehold property

Fivestar, a property development company, entered into a loan arrangement with a bank. As security for the loan, Fiverstar granted security over its freehold interest in commercial property in Croydon, let to a tenant. Fivestar defaulted, the bank called in the loan and subsequently appointed administrators and receivers, who recovered a sum of £130,000 in respect of rent. The administrators then inexplicably gave notice to dissolve Fivestar on the basis that *"there are no further assets that remain to be realised"*.

Following dissolution, the receivers continued to deal with the lease which was due to expire on 24 March 2014. Pursuant to the Landlord and Tenant Act 1954 the tenant issued a claim for a new lease on 30 April 2014. As Fivestar was dissolved by this date, and any remaining assets vested in the Crown *bona vacantia*, the tenant served notice of its claim on the Treasury Solicitor. In response, the Treasury Solicitor disclaimed the Crown's interest in the freehold.

The bank subsequently applied for Fivestar to be restored to the register and placed in liquidation, together with an order that the property be re-vested in Fivestar.

The Court confirmed that when the property was disclaimed by the Crown, it still owned the land but without the freehold interest and all the rights and obligations that went with it. It held that the effect of Fivestar's restoration was that the freehold estate was retrospectively re-created and re-vested in Fivestar in all respects as if it had never been dissolved and as if the freehold had never been disclaimed. The Court confirmed that from a policy perspective it would be *"highly undesirable"* for freehold and leasehold interests to be treated differently. It was not very concerned about the need to protect the Crown from uncertainty as regards re-vesting because, after all, the

Crown had decided to disclaim the property and could instead have disposed of the property for value.

***Cain v Islington LBC* [2015] UKUT 542 (LC)**

Payment by a tenant of a series of service charge payments indicates his agreement as to the amount

Mr Cain acquired the lease of a one bedroom flat in London in 2002. Islington LBC was Mr Cain's landlord. Between 2002 and 2014 Mr Cain raised various enquiries about the service charge but paid it without any qualification. In 2014, Mr Cain issued an application challenging the reasonableness of the service charge over a period of 12 years under section 27A of the Landlord and Tenant Act 1985.

The tribunal held in the first instance that Mr Cain was prevented from claiming by section 27A(4) of the Act which provides that an application cannot be made where a matter has been *"agreed or admitted by the tenant"* although by virtue of section 27A(5) a tenant is not *"to be taken to have agreed or admitted any matter by reason only of having made payment"*. The tribunal held that the series of payments made by he without protest was a clear indication for the purposes of section 27A(4) that he had agreed to the service charge as calculated and apportioned. Such an inference could not be made from a single payment but could from a series of payments; the longer a period over which payment is made, the more readily the tribunal would infer the tenant's agreement.

Mr Cain's appeal was dismissed.

***Chesterton Commercial (Oxon) Ltd v Oxfordshire CC* [2015] EWHC 2020 (Ch)**

Council liable for negligent misstatement and reduced value of property where car parking spaces in fact part of public highway

Chesterton was the developer of properties at 94 and 96 Bell Street and 2A Bell Lane in Henley-on-Thames. This included some land fronting 94-102 Bell Street comprising a footway, driveway and private car parking spaces. Chesterton intended to develop the land and sell the properties and car parking spaces. The Council was the statutory highway authority with responsibility for Henley-on-Thames.

Under section 36 of the Highways Act 1980 each County Council must make, and keep corrected and up to date, a list of the streets within their area which are highways maintainable at the public expense. This list is to be kept at the County Council office and be available for free inspection at all reasonable hours.

In or around 2005 or early 2006, the Council supplied to Chesterton a highway plan which showed that most of Bell Street was maintainable as a public highway but the land fronting 94-102 Bell Street was not. There was nothing in the response from the Council to pre-contract enquires about the long running investigation it had been conducting about whether the position in the highway plan was correct. Chesterton then put the properties on the market for sale.

As Chesterton negotiated to sell number 94 Bell Street, the prospective purchaser discovered the Council's investigation and informed Chesterton. Given the uncertainty about ownership, the sales of nos. 94 and 96 completed at reduced prices without the car parking spaces intended to go with them. Chesterton applied for a stopping up order in relation to the land which was refused when the Council concluded, on the basis of evidence, that the land was, and always had been, a public highway.

Chesterton issued a claim for £400,000 in damages being the difference between the price it had paid for the properties and their true value without the land that was now confirmed to form part of the public highway, plus a further £150,000 in legal fees spent trying to mitigate the loss by applying for the stopping up order.

The Court found that the Council owed Chesterton a duty of care in common law with respect to its responses to Chesterton's enquiries. The search results provided to Chesterton were not accurate and the Council had failed to keep its records up to date as required by statute. The Council was liable for negligent misstatement. Chesterton was awarded £240,000, which the Court found to be the value of the car parking spaces, and its professional fees. Chesterton was also awarded the additional legal fees for the sales of nos. 94 and 96 Bell Street (estimated at £1,000) and the increased costs of funding for the purchase of the property.

***Skelwith (Leisure) Ltd and others v Armstrong and others* [2015] EWHC 2830 (Ch)**

Equitable owner of a legal charge has power of sale

Members of the Armstrong family owned Flaxby Golf Club which they sold to Skelwith Leisure Limited. Skelwith paid a proportion of the purchase price on completion, with the remainder payable by instalments secured by a charge over the club.

Skelwith failed to make the agreed payments. On 5 February 2015, a transfer was executed to assign the charge to Polar Holdings Limited, a company controlled by the Armstrong family. The transfer was not registered at the Land Registry and so Polar only had an equitable rather than legal interest in the charge.

Polar then attempted to sell the club under the statutory power of sale for charge holders under section 101 of the Law of Property Act 1925 (LPA 1925). Skelwith sought an injunction to restrain Polar from selling the club, including on the ground that it was not the legal owner of the charge.

The Court was asked to examine the meaning of the *"owner's powers in relation to a registered estate or charge"* contained in sections 23 and 24 of the Land Registration Act 2002. Could Polar use the statutory power to sell the club despite only being the equitable owner of a legal charge? The Court decided that the reference to 'permitted under the general law' in s 23(2) implies that a person who has no more than an equitable interest is not entitled to exercise a power of sale unless the particular statute conferring the power actually allows for its exercise by someone lacking legal ownership. For Polar this meant that it was not enough to show that it could have exercised the power of sale if it had been registered as proprietor of the charge – it had to show that it is also exercisable by an equitable owner under 'the general law'.

The Court then considered section 106(1) of the LPA 1925, which states that the statutory power of sale can be exercised by any person 'entitled to receive and give a discharge for the mortgage money'. The crucial issue was whether Polar was so entitled, given that it only had an equitable interest. The Court found that Polar was entitled for the purpose of section 106(1) and so could exercise the power of sale.

A version of this case summary appeared in Lexis PSL on 9/11/2015.

***A2 Dominion Homes Ltd v Prince Evans Solicitors* [2015] EWHC 2490 (Ch)**

Unlateral notice to protect agreement for lease also protects the lease

A2 was the successor to Acton Housing Association Ltd who on 9 December 2004 entered into an agreement for 33 long leases with Remitone Properties Ltd, the then freehold owners of Stephenson House, Bletchley. The purchase price was £3,730,540 and completion was to take place 15 working days after Acton received notice of practical completion of works. Acton was required to pay, and paid, a deposit of £1.25 million.

Shortly after exchange of the agreement for lease, Acton's solicitors entered a unilateral notice against Remitone's freehold title to the building. On 17 May 2007, Remitone granted a charge over its freehold title to a bank who made an application to the Land Registry to register its charge. Shortly afterwards, but within the bank's priority period, the solicitors made an official search of the register on behalf of Acton. The Land Registry wrote to them to confirm that the bank's charge had priority.

On 17 July 2007, the leases of the 33 flats were granted with terms backdated to 1 January 2006 pursuant to the terms of the agreement for leases. The bank's consent was not obtained. On 22 August 2007 a notice was registered against Romitone's freehold title in respect of the bank's charge and on 9 November 2007 a notice was registered on Romitone's title in respect of the 33 leases.

Acton sued its solicitors for negligence. The Court considered the preliminary issue as to the priority between the two interests. The solicitors argued that the 33 leases had priority over the bank's charge and that the bank's consent to the grant of the leases had not been required.

The Court agreed. The priority afforded to the agreement for lease by the unilateral notice protected both the agreement for lease and the completed leases resulting from the agreement. If this argument were not correct then the unilateral notice would not confer any protection at all if there was a significant gap between the entry into an agreement for lease and the actual grant of the lease. Therefore, the leases had priority over the bank's charge. The Court confirmed that a purchaser of Romitone's freehold would have been bound by the agreement for leases and the bank ought not to be in a different position.

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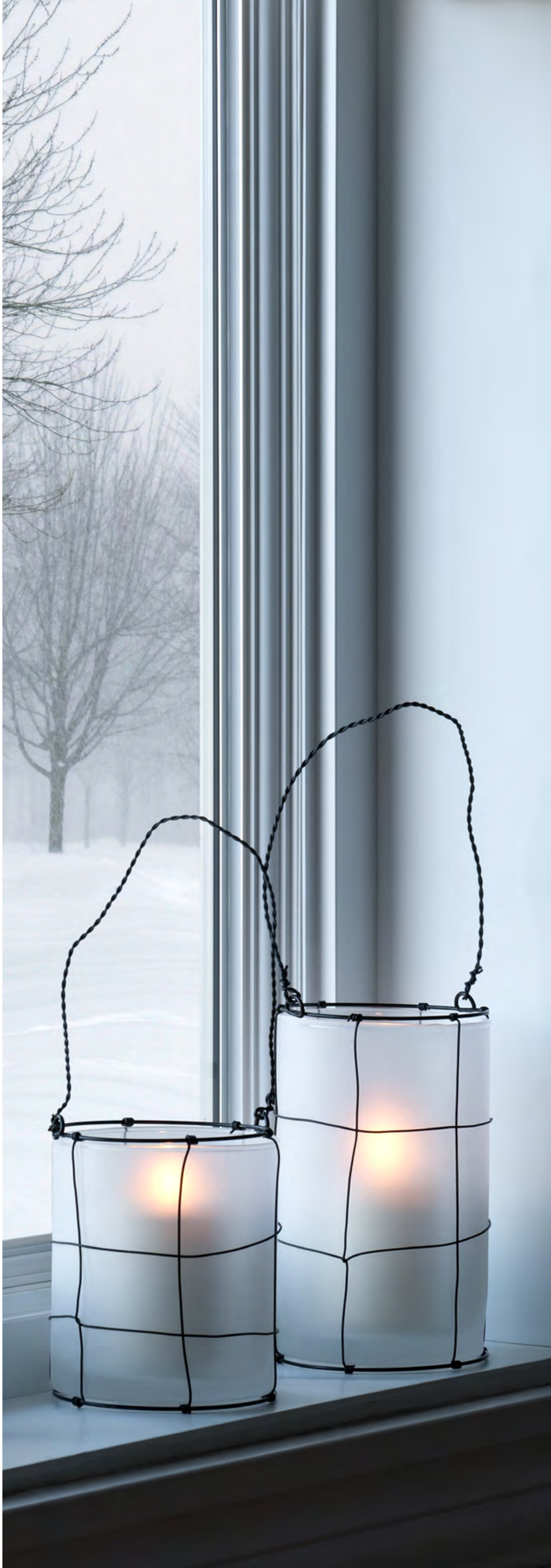

Autumn Statement 2015: Chancellor unveils ambitious housing plans

The government's Autumn Statement included a range of measures designed to stimulate housing development. Proposals to relax Green Belt controls on brownfield sites, release commercial and industrial land for housing, and impose tougher standards on Local Planning Authority (LPA) performance are particularly eye-catching. Michael Gallimore and Claire Dutch set out the plans announced in relation to Planning and examine their implications.

On 25 November Chancellor of the Exchequer, George Osborne, delivered the government's Spending Review and Autumn Statement 2015. This contained important announcements for the housebuilding industry. A summary of the most significant matters is as follows.

- There is a "Five Point Plan" for housing that represents "the most ambitious plan since the 1970s" to promote home ownership. In essence that plan includes the measures set out below.
- The objective is to deliver 400,000 affordable housing starts by 2020-21, focusing on low-cost home ownership.
- Those housing starts are to include the following:
  - 200,000 starter homes to be sold to young first time buyers at a 20% discount off market value
  - 135,000 "Help to Buy: Shared Ownership" homes, open to all households earning less than £80,000 outside London and £90,000 in London
  - 10,000 homes in relation to which tenants will be entitled to save for deposits while renting.
- In order to deliver this building program, the private sector will be invited to play a role in delivery, and constraints (such as those which concern bids for government funding) will be relaxed accordingly.
- There will be further planning reforms to stimulate supply, including the introduction of a "new delivery test" on LPAs, to monitor housing delivery against development plan targets.
- Public sector land with capacity for 160,000 homes will be made available.
- The release of unused and undeveloped commercial, retail and industrial land for starter homes will be supported.
- Also supported will be the development of brownfield sites in the Green Belt "by allowing them to be developed in the same way as other brownfield land, providing it contributes to starter homes, and subject to local consultation".
- A sum totalling £2.3 billion in loans will be used to "help regenerate large council estates and invest in infrastructure needed for major housing developments". It is not entirely clear what is proposed here and we await further detail with interest.
- Planning policy amendments will promote the development of small housing sites, as will plans to halve the length of the (12 month) "planning guarantee" for minor developments.
- The proposed garden city at Ebbsfleet will be the subject of substantial investment.
- There will be "a more standardised approach to viability assessments" submitted in support of planning applications.
- The existing temporary right to appeal against onerous section 106 agreements will be extended to 2018.
- The regime for the deemed discharge of planning conditions will be reviewed.
- New rules will allow local communities to allocate land for housing in neighbourhood plans, even where such land is not allocated in the local plan.
- Finally, LPAs will be expected to perform better in development control. The current acceptability threshold for the quality of decisions will be tightened, so that LPAs will be labelled as under-performing (allowing applications to be made direct to the Secretary of State) if more than 10% of major decisions are overturned on appeal. However wider circumstances, such as the local plan status, will for the first time be taken into account where relevant.

Comment

These measures will be welcomed by the housing industry.

Particularly eye-catching are plans to allow the release of commercial, retail and industrial land for housing development. Where such sites are vacant or underused they represent a lost opportunity in housing terms, and could cumulatively contribute significantly to meeting the soaring need for residential accommodation. Such pragmatism in policy-making will instil confidence in the development industry that the housing crisis is being given the importance it deserves. On the other hand, LPAs will be uncomfortable at the prospect of local plan allocations being overridden and potentially valuable employment land being lost. Others will point out the need for sustainability and, in particular, the importance of infrastructure, employment and other service support for new housing. There is plainly a balance to be struck.

Similarly, plans to relax Green Belt controls are likely to be controversial in principle. In practice, however, this is likely to concern few sites which contribute significantly to the purposes of the Green Belt, and could involve the enhancement of land which currently offers little in terms of visual amenity. It also reflects, importantly, a move away from the notion that all Green Belt land is equal and worthy of protection for its own sake. The role of the "local consultation" referred to is unclear and the industry will await with interest further detail on this matter in particular. Certainly, however, there is the prospect of a significant addition to housing numbers in areas where policy is restrictive and pressure is accordingly at its highest.

Greater expectations of LPAs will also be welcomed. Both in relation to housing delivery, and development control, tougher thresholds will act as a focus for good and timely performance. At the same time, however, a deficit of resources lies at the heart of underperformance in these respects, and there appears to be little in the Autumn Statement to acknowledge this problem, let alone address it. Commentators have noted in particular that no mention has been made of planning fees. Broadly speaking, the development industry is alive to the arguments in favour of raising fees and the resourcing advantages that this might bring; many feel that the Government would be prudent to explore it.

Notable by its absence is any reference to the Build to Rent sector. As commentators continue to point out, this represents an important part of the housing market at the affordable end in particular, and must not be marginalised in the drive for increased home ownership.

Four further points. First, the government appears to recognise the difficulties surrounding viability assessments. These often comprise a focus of contention between developers and LPAs; guidance that is realistic and uncomplicated could help to avoid delays that are unwanted on both sides.

Second, proposals to extend the right to appeal against onerous planning obligations signals Whitehall's recognition that, whatever the shortage of housing, the development sector faces ongoing market-related challenges.

Third, many will note with interest the reference to joint working between the private and public sectors, and hope that this might help to accelerate delivery by making up funding shortfalls.

Fourth, smaller developers will await with interest the promised policy amendments to promote smaller schemes. Operators in that sector often point out, rightly, their important contribution made towards market diversity as well as housing numbers. At the same time many will raise eyebrows at the proposal to "halve the length of the planning guarantee" for projects in this category; the existing guarantee already appears little observed in practice, and reducing the target to six months for the determination of all housing applications and appeals appears highly ambitious, to say the least.

Finally, it is worth pointing out that the reforms discussed above have been announced shortly after the Housing and Planning Bill – containing a further set of wide reforms – has begun its passage through Parliament. This timing will raise eyebrows in some quarters. The development industry, like other sectors, thrives on certainty and stability in policy and legislative terms, and whatever the merits of the proposals in question there will be concerns at the prospect of the drip-feed reform that has characterised the planning system for so many years.

Breaking news: M&S loses break clause appeal

Tenants cannot recover any rent paid in advance when they exercise a break clause. This was the conclusion of the Supreme Court in the final chapter of the long running Marks and Spencer break clause case. Mathew Ditchburn reports on the judgment.

You may recall that in May 2014 the Court of Appeal overturned a High Court decision that M&S was entitled to be reimbursed rent it had paid in advance relating to the period after it had broken its lease. M&S had been required to pay the full quarter's rent in order to exercise the break, even though the break date was part way through the quarter. There was no express provision in the lease entitling M&S to a reimbursement.

The High Court took into account that the break conditions included the payment of a penalty by the tenant, which had been satisfied. It concluded that the parties could not have intended that the landlord should keep the excess rent as well. Therefore, there was an implied term that the excess rent should be repaid.

The Court of Appeal disagreed, saying that any such intention would have manifested itself as an express term and should not be implied.

On 2 December 2015 the Supreme Court agreed, unanimously dismissing M&S's appeal.

The judgment sets out the correct approach to implying contractual terms: a term will only be implied if it satisfies the test of business necessity or it is so obvious that it goes without saying.

It is well-established that rent payable in advance is not apportionable under case law or statute. So, for example where a lease is forfeited in the middle of a quarter, the tenant is not entitled to a return of any of the rent paid in advance.

That being so, the Supreme Court found that it would be wrong, save in a very clear case, to infer that a landlord and tenant intended something different, and that the tenant should receive back an apportioned part of the rent paid in advance. This did not give rise to any anomaly that made the lease unworkable or commercially or otherwise absurd.

The decision sends out a clear message: if a tenant wants to get back rent it pays in advance relating to periods after a break date, it must write that requirement clearly and unambiguously into the lease. The courts will not fill in the blanks.

Case: *Marks and Spencer plc v BNP Paribas Securities Services Trust Company (Jersey) Limited and another [2015] UKSC 72*

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This newsletter is written in general terms and its application in specific circumstances will depend on the particular facts.

If you would like to receive this newsletter by email please pass on your email address to one of the editors listed below.

If you would like to follow up any of the issues, please speak to one of the contacts listed below, or to any real estate partner at our London office on +44 20 7296 2000, or to any real estate partner in our worldwide office network as listed at the back of this newsletter:

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