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LEASEHOLD DWELLINGS UPDATE

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ABOUT RICHARD SNAPE

Richard has been the Head of Professional Support at Davitt Jones Bould since 2002. He speaks at numerous courses for law societies all over the country, various public courses, in-house seminars within solicitors' firm and has also talked extensively to local authorities and central government bodies. His areas of specialism include both commercial and residential property, in particular in relation to local government law, conveyancing issues, development land, commercial property and incumbrances in relation to land.

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- No Search Indemnity Insurance
- Party Wall Insurance
- Planning Permissions Indemnity Insuranc
- Possessory Title Indemnity Insurance
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- Restrictive Covenant Indemnity Insuranc
- Right To Light Insurance
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- Title Indemnity Policy Scotland
- Town & Village Green Insurance
- Unknown/Adverse Rights Insurance

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If you would like to speak to us to see how we can help or to request a quote, please call our broking team on **01293 880 700** or email us at enquiries@lawsureinsurance.co.uk

OUTCOME FOCUSED TRAINING INFORMATION

Lecture is aimed at: Property professionals and fee earners involved in both contentious and non-contentious property work

Learning Outcome: To give an increased knowledge of the subject matter. To update on current issues, case law and statutory provisions and to be able to apply the knowledge gained in the better provision of a service to the client.

Satisfying Competency Statement Section: B – Technical Legal Practice

For further information please see http://www.sra.org.uk/competence

TABLE OF CONTENTS

BUILDING REGULATIONS AND GRENFELL

Prior to the Grenfell disaster the Welsh Government had already introduced a requirement for sprinkler systems in new residential buildings. In December 2018 similar requirements were introduced in England but only for residential buildings of 30 metres or more in height. There is also a ban on various types of cladding in relation to buildings more than 18 metres in height. This is not retrospective but is under review.

THE FIRE SAFETY ACT 2021

The Act finally received the Royal Assent on 29 April 2021. It will not come into force until detailed guidance has been provided. The Act clarifies the Regulatory Reform (Fire Safety) Order 2005 and makes clear that a fire safety risk assessment where there are at least two dwellings in a building must include the exterior, structure, external doors and windows, internal doors which open into the common parts, balconies and other external fixtures. Non-compliance may result in prosecution of the responsible person, ie. the landlord and buildings insurance may be vitiated. The House of Commons successfully rejected a House of Lords amendment whereby the cost of the assessment and any works would not be added to service charge.

In the Queen's Speech on 11 May 2021, the Government announced that it would be going ahead with the Building Safety Bill 2021 whereby, amongst other things, an appropriate person would have to be appointed to oversee health and safety in residential high rise blocks. They would have ultimate responsibility to the Health and Safety Commission.

THE EWS1 FORM AND EXTERNAL CLADDING

Following the Grenfell disaster in June 2017, mortgage companies naturally became reluctant to lend on flats in blocks which might have combustible cladding. On occasion, valuers were valuing such flats at £0. There was, moreover, no standardisation between the lenders.

The industry's response was the EWS1 (external wall systems) Certificate which was introduced in December 2019 after discussion between UK Finance and the Royal Institution of Chartered Surveyors. A recognised property professional with the requisite qualification would carry out an inspection where deemed appropriate and would produce an EWS1 Certificate which would be required by the mortgage company. The certificate would last for five years and would only be required for multi-let residential properties of more than 18 metres (c. six storeys) in height. If the cladding was deemed safe then the mortgage company would proceed, it would require the cladding to be replaced, a process which can take a significant amount of time.

Unfortunately, in January 2020, the Department of Housing Communities and Local Government muddied the waters somewhat when it produced **Advice for Building Owners of Multi-Storey, Multi-Occupied Residential Buildings**. This suggested that the EWS1 may be appropriate in some multi-let premises of less than 18 metres in height and which do not have external cladding, the concern apparently being high pressure laminate which is causing some concern. This concern increased after it was found to contribute to a fire in a block of halls of residence in Bolton in November 2019. As a consequence of this, some mortgage companies have required the EWS1 on buildings with three storeys and where brick is the building material. This is surely not what was intended.

The real problem is that there appear to be only 300 qualified fire safety inspectors in the country and insurers are not prepared to allow other property professionals to carry out the assessments due to the potential level of liability where there is a claim. Estimates vary but at the higher end there may be up to 3 million flats which may be affected. The certificates can cost upwards of £10,000 and there are examples of landlords or agents (who commission the assessments) being quoted of up to the 10 years for one to become available.

On 27 November 2018 in England (January 2020 in Wales), cladding was finally banned in multi-let residential properties of more than 18 metres in height. If the building was completed under the 2018 Building Regulations the mortgage company should not require the certificate.

The EWS1 is undergoing review and this cannot come too soon for many, especially at the current time when many are unable to relocate to the countryside from their small city-centre dwellings. If changes are not made soon, some estimate that the level of negative equity in such premises will be greater than during the credit crunch of 2008-2011.

Note: On 22 November 2020 the Department of Housing announced that they have reached agreement with the RICS and UK Finance whereby an EWS1 Certificate will not be required for buildings without cladding. At the time of writing, many mortgage lenders are saying that they know nothing about this. They are also pointing out that many brick buildings may have cladding behind the brickwork.

On 8 March 2021, the Royal Institution of Chartered Surveyors produced its new guidance note on the valuation of properties in multi-storey multi-occupied residential buildings with cladding. The guidance comes into effect on 5 April 2021, but it is expected that valuers will take it into account immediately.

The guidance is as follows:

- The certificate should be required for buildings over six storeys in height where there is cladding or curtain wall glazing or where there are balconies vertically above one another and both the balustrades and decking are constructed where combustible material such as timber, or where the decking is constructed of combustible material and the balconies are directly linked by combustible material.

- If the building is of five or six storeys in height then a certificate will be required if approximately one quarter of the whole elevation estimated from a viewing at ground level is comprised of cladding, or there is aluminium or metal composite material or high pressure laminate panels on the building or fire risk in relation to balconies as above

- If the building has fewer than five storeys a certificate will be required if there are aluminium or metal composite or high pressure laminate panels on the building

The guidance also makes clear that if the building complies with the Building (Amendment) Regulations 2018 (or 2020 in Wales) an EWS1 certificate should not be required.

At first glance this alleviates many of the problems, in particular there are examples of EWS1 certificates being required for three or four storey buildings with brick facades. Hopefully, this will be a thing of the past. However, the original purpose of the EWS1 certificates has been expanded to include high pressure laminate and balconies and not merely combustible cladding. Buildings of less than 18 metres in height may also still require the certificates which was not what was intended when the EWS1 was introduced.

Although a step in the right direction and the guidance has solved the problems for some, do not assume that the issue has gone away.

SERVICE CHARGE LIABILITY

Both residential and commercial service charges are likely to be greatly affected, especially, where is usually the case, service charge allows recovery of payments for improvements and statutory works. In **Finchbourne v Rodrigues [1976] All E.R 581** it was held that there would be an implied term that the work must be reasonably incurred. In council house right to buys, the purchaser will be given an estimate of future works within the next five years from purchase but after this time the service charge may increase greatly. Due to the so called 'Florries Law', the liability of former council tenants cannot exceed £10,000 in any five year period. However, this will only apply in relation to works funded by Central Government.

Under the Service Charge Consultation Requirements (England) Regulations 2003 and the Service Charge Consultation Requirements (Wales) Regulations 2004, which came into force on 31 October 2003 and 1 March 2004 respectively, then if consultation does not occur between landlord and tenants in relation to service charges and dwellings, there will be a statutory cap of £250 for the works. Therefore, it is suggested that a management enquiry is made to the effect of, whether there has been any major works within the meaning of the Regulations and if so did consultation occur.

FirstPort Property Services Ltd v various long leaseholders of Citiscape LON/00AH/LSC/2017/0435

In March 2018 First Port obtained the tribunal rulings to the effect that tenants would be responsible for the replacement of aluminium cladding in a block of flats in Croydon. The cost is currently assessed at £2m including a bill of £4,000 per week to employ fire wardens. The maximum individual liability is £31,300.

In April 2018, the developer, Barratts, announced that they would voluntarily pay for the works.

In **Zagora Management v Zurich Insurance Plc [2019] EWHC 140 (TCC)** the cost of replacing the cladding was £10m. This was covered by a newbuild guarantee but the guarantee had a cap of £3.5m. This case has now been reversed by the Court of Appeal **[2019] EWHC 257 (TCC)**

Blue Manchester Ltd v North West Ground Rents Ltd [2019] EWHC 142 (TCC) the case involves the Beetham Tower in Manchester. The tower consists of an hotel with residential properties above. It was found that the cladding was not sufficiently bound with the glasswork. The landlords were a ground rent management company with who held the freehold. They originally proposed *stitch plate* repairs but the tribunal held this as not satisfactory. The damage constituted disrepair and was thus within the landlords' liability and it seems that some of the cost cannot be recouped by service charge. It is unlikely that any of the parties forsaw such major works in the early years of the building. In October 2020 North West Ground Rents applied to Court arguing that they could not reasonably comply with the terms of the specific performance. They failed in this application.

GROUND RENT ISSUES

Be careful where the ground rent exceeds £250 per annum or £1,000 per annum in Greater London. This may create an assured tenancy under the Housing Act 1988. If this is so, then mandatory ground 8 will apply and if there is defined rent arrears at both the dates of service of a notice seeking possession and at the date of any court proceedings the tenant will be evicted. There cannot be forfeiture of an assured tenancy and therefore there is no relief from forfeiture. Recently many mortgage companies have refused to accept this. They may require a mortgagee protection clause and/or insurance. This will also be a problem if the ground rent can double beyond these amounts. It only applies to leases created from 15 January 1989 onwards but this would include lease extensions which constitute a surrender and re-grant. Note also that Part 1 of the Landlord and Tenant Act 1987 and the right of first refusal will not apply to assured tenancies.

In June 2019 many of the developers agreed a code of practice whereby ground rents for new leases would not increase at less than twenty-year intervals and for existing leases the developer would cooperate in a variation of a lease where the ground rent increased at less than twenty-year intervals and replace the provision within RPI increase. There would be no new leasehold houses and for existing leases the developer would cooperate in transferring the freehold on fair and reasonable terms.

On 10 December 2020 Barratt Homes and Bellway Homes announced that they would no longer have ground rents other than a peppercorn on their new leases. The term would be 999 years and there would be a resident's management company. Countryside announced they would only include a peppercorn rent and a 250-year term. Taylor Wimpey would stop having a ground rent other than a peppercorn and Berkeley Homes would only include a peppercorn in some developments.

When the new Help to Buy scheme came into force in England on 1 April 2021 ground rents other than a peppercorn were banned.

On 7 January 2021 the Ministry of Housing, Communities and Local Government announcing that they would go ahead with legislation reforming leasehold in this Parliamentary year. We do not know the detail but proposals include allowing the extension of both houses and flats to be a further 990 years. Currently, there is a statutory right to extend the lease of a leasehold house for 50 years and a flat for two 90-year terms. There is also an ability to buy the freehold of a leasehold house after holding the lease for two years. It may be asked why someone would want to 990-year extension when they can already buy the freehold. The Government also intends to ban ground rents other than a peppercorn but this will not be retrospective and most developers have gone down this route already. Leasehold houses will also be banned but not retrospectively. Shared ownership leases would be the exception. Again, most developers have gone down this route already. Marriage value will also be abolished. The Government announced on 11 May 2021 that they would go ahead with this legislation in the current Parliamentary year. There will be a drive towards commonhold developments.

The Leasehold Reform (Ground Rent) Bill 2021

This applies to England only.

The Bill was announced in the Queen's Speech on 11 May 2021 it was published and introduced into the House of Lords on 12 May 2021.

When it comes into force ground rents other than a peppercorn will be banned in leasehold dwellings of more than 21 years' duration although it will not be retrospective. Non-compliance may lead to a

fine of up to £5,000 and the ground rent will not be able to be collected. Shared ownership leases are excluded and other exemptions apply in relation to community led housing projects, equity release schemes and Sharia mortgages.

PLANNING PERMISSION CHANGES

The town and country planning regulations 2020 (ENGLAND ONLY)

These provisions apply to England only. In 2018 the Welsh Government announced a review of planning use, but we have heard nothing since.

Part of these came to force on 1 August 2020. Purpose built blocks of flats will be able to build two additional storeys of no more than 7 metres in extent and the new building must be no more than 30 metres. This is subject to prior approval which can be refused because of flooding, external appearance, natural light, traffic and highway impact or defence assets.

From 1 September 2020 Class A1, shops, A2 financial and professional services, A3 restaurants and cafes and B1 business will all be subsumed in a new Class E. Class E will include the following:

1. the display or retail sale of goods, other than hot food, principally to visiting members of the public,
2. the sale of food and drink principally to visiting members of the public where consumption of that food and drink is mostly undertaken on the premises,
3. the provision of the following kinds of services principally to visiting members of the public
    a. financial services,
    b. professional services (other than health or medical services), or
4. any other services which it is appropriate to provide in a commercial, business or service locality,the provision of medical or health services, principally to visiting members of the public, except the use of premises attached to the residence of the consultant or practitioner, a creche, day nursery or day centre, not including a residential use, principally to visiting members of the public, for:
    a. an office to carry out any operational or administrative functions,
    b. research and development of products or processes, or
    c. any industrial process.

IN ADDITION:

Drinking establishments, takeaways (the old use classes A4 and A5) are now added to the list of sui generis uses along with cinemas and live performance venues. A change of use involving those uses still requires planning permission.

There is a new Class F1 use class applies to residential and non-residential institutions; and

A new Class F2 use class applies to community uses.

Note: These regulations underwent judicial review. On 18 November 2020 the High Court threw out the claim.

Note: On 31 March 2021 the Government made the Town and Country Planning General Permitted Development (Amendment) (England) Order 2021 in front of Parliament. It comes into force on 1 August 2021 and introduces a new Class MA. This will allow Class E to be converted into Class C3 dwellings subject to prior approval. It will only apply to buildings with a floor area of 1500 sq metres or less. They will have to have commercial use for at least two years and have been vacant for at least three months.

POSSESSION PROCEEDINGS AND CORONAVIRUS

From 27 March 2020 there was a stay on possession proceedings both in residential and commercial property. This came to an end on 30 September 2020.

The Coronavirus Act 2020 increased the notice period for assured shorthold tenancy from two months to three months. Originally, this was to last until 31 August 2020. As of 1 September 2020 the notice period was increased to six months. It will still be three months, however, if the rent is more than six months in arrears or if possession is on the grounds of illegal immigration. It is two months if possession is on the grounds of anti-social behaviour, domestic abuse, riot or fraud. These provisions were due to end on 31 March 2021, but were extended to 31 May 2021.

As of 1 June 2021 notice periods went down to four months.

Notices seeking possession for defined rent areas were originally required to be for two months. This was increased, with exceptions, to six months and reduced to four months on 1 June 2021. It will be reduced back down to two months on 1 August 2021.

On 11 May 2021, in the Queen's Speech, the Government announced its intention to proceed with the Renter's Reform Bill whereby non-fault evictions and S21 shorthold notices would be abolished.

GAS SAFE REGULATION CHANGES

In relation to rented property a Landlord must at any time have a Gas Safe certificate which is no more than one year old and must present a copy to the Tenant within 7 days. As of October 1st, 2015 the Landlord may not use the shorthold ground for possession if there is not a valid certificate in place. This latter provision was introduced by the Deregulation Act 2015 and applies to England only.

Similar provisions will come into force in Wales when the Renting Homes (Wales) Act 2016 comes into force.

Note: In **Caridon Properties v Monty Shooltz (Central London County Court) 2 February 2018** the county court accepted that if a gas safety certificate is not given to the tenant at the beginning of the tenancy agreement then the landlord can never use the shorthold ground for possession. This is not a precedent but seems to confirm the wording of the legislation.

A similar decision was reached in **Trecarrel House v Rouncefield [2020] EWCA760.** In June 2020 the Court of Appeal gave judgment in this case. It was held that failure to comply with gas safe requirements initially did not prevent later compliance and service of a valid S.21 notice.

When the Renters Reform Bill becomes law, it is planned to abolish S.21 notices and no fault evictions thus making the issue less important.

Electrical Wiring Certificates (England only)

These were not previously required for buy to lets although an HMO licence will not be obtained without one. There is provision in the Housing & Planning Act 2016 to make them compulsory.

These provisions came into force on 1 July 2020 for new leases and 1 April 2021 for existing leases.

NEW MODEL SHARED OWNERSHIP LEASES (ENGLAND ONLY)

These should have been available by 1 April 2021, but on 24 May the Government announced that they would apply as of 28 June 2021. They will be a condition of planning permission as of that date unless the developer has already expended significant time and money in relation to the old regime. The new model leases were meant to be available from Homes England (HE) on 1 May 2021. It was then announced that they would be available on 31 May 2021 but as of the beginning of June they still have not been published. A purchaser will be able to buy with a 10% share and not the current minimum of 25%. They may also staircase up in 1% tranches for the first fifteen years of the lease and not the current minimum 10%. The Housing Association would not be able to charge for this increase and any valuation would be based on house price inflation in the area. The conveyancer would, however, be allowed to charge. There will also be provision whereby the tenant will be able to claim back the costs of repairs up to a maximum of £500 per annum from the landlord. If the maximum is not used in one year it can be held over into the next. It will not apply to any works covered by a new build guarantee scheme. The extent of the repairs is currently not clear nor is it clear what happens if the tenant has already expended money in advance of making a claim.

The landlord must be responsible for structural and exterior repairs including to floors, ceiling and stairs for the first ten years but the full extent of the landlord's liability is still not clear.

The right of pre-emption and eight weeks' notice period which must be given to the landlord will be reduced to four weeks although the Housing Association rarely exercises this right.

The lease will be for 990 years.

Whether any of this encourages staircasing up to 100% is debatable. It is estimated that only between 2% and 3% of shared owners staircase to 100%.

RECENT CASE LAW

89 Holland Park (Management) Ltd v Hicks [2020] EWCA 758 – HPML was the freeholder of a large Victorian building which was divided into five flats all of which were held under long leases. The leases were subject to the freeholder giving consent development which was not to be unreasonably withheld.

The Court of Appeal held that the freeholder was entitled to take into account the interest of the leaseholders as well as its own interests. The freeholder could also raise valid objections on aesthetic grounds even though this would not affect the value of the reversion.

Duval v 11-13 Randolph Crescent [2020] UKSC 18

The Supreme Court confirmed that where a lease contained an absolute covenant not to cut maim or injure any…wall, the landlord could not waive this obligation as there was also a covenant to enforce tenant's covenants in the lease.