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# Commercial Leases Update

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## ABOUT RICHARD SNAPE

Richard has been the Head of Legal Training at Davitt Jones Bould (DJB) since 2002. He speaks at numerous courses for law societies all over the country, various public courses, in-house seminars within solicitors' firms 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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**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

Contents

**THE LEVELLING-UP AND REGENERATION ACT 2023: HIGH STREET RENTAL AUCTIONS (ENGLAND ONLY)**

This was announced in the Queen's Speech and introduced into the House of Commons on 11 May 2022. Part 10 allows local authorities to designate high streets or town centre streets or areas as being important to the local economy because of a concentration of high street users. This will include shops, offices, restaurants, pubs, meeting places, community halls and light industrial units, but not warehouses.

The legislation came into force on December 2nd 2024, as did the Local Authority (Rental Auctions) (England) and Town and Country Planning (General Permitted Development) (Amendments) Regulations 2024. There is also non-statutory guidance in place. Bassetlaw, Darlington and Mansfield Councils are early adopters with Bournemouth Christchurch and Poole Council acting in an advisory role. On March 7th 2025, eight more local authorities agreed to take part in the scheme.
If premises are vacant for at least one year or 366 days or more in the last two years, but are suitable for high street use the local authority can notify the landlord that they intend to put the premises up for high street rental auction. The local authority must consider that occupation would be beneficial to the local economy, society or environment. Occupation involves regular presence of people at the premises but there is no clear definition of what this means, for instance, what about use as storage? Premises includes the whole or part of the building or any that with reasonable adaptation can be used as such.

The first stage is for the local authority to serve an initial notice which may last up to 10 weeks. During this period the owner cannot rent out the premises without the consent of the local authority unless a contract is already in place. The local authority must consent to letting if the tenancy is for at least one year and the local authority is satisfied that the lease will result in occupation by the regular presence of people.

If the premises have not been let within 8 weeks the local authority may serve a final letting notice expiring a maximum of 14 weeks later. During the period the landlord cannot let out the premises or carry out works without local authority's consent.

The local authority can then conduct a rental auction for a lease of between one and five years' duration. The lease will be excluded from the Landlord and Tenant Act 1954. The local authority acts in its own name but with an indication that it is binding on the landlord. The local authority will give the landlord a signed copy of the tenancy agreement as soon as is reasonably possible. The terms of the tenancy will be down to regulations but it can include a requirement for the landlord to carry out works or allowing the tenant to do works. The local authority must have regard to any representations by the landlord.

The landlord can counter-notice on the final letting notice being served. The counter-notice may include the fact that the landlord intends to carry out substantial works of construction, demolition or reconstruction affecting the premises, or they intend to occupy for their own business or residential purpose.

There will be an agreement for lease during which time the landlord must bring the premises up to a minimum standard, for instance in relation to water ingress, mould and damp, fire, gas and electrical safety. It is envisaged that the lease itself will be standardised. The tenant must yield up in the same condition and there must be a schedule of condition.

A mortgagee and superior landlord will be deemed to have given consent to any lease. There will be no requirements to bring up to Minimum Energy Efficiency Standards but the landlord may face enforcement action for non-compliance. Permitted development is changed to allow any use for the duration of the tenancy but not afterwards and planning permission may still be required for building work. The local authority will prepare the auction pack and the landlord must respond to enquiries, provide proof of title and other documents. Non-compliance may result in a £2,500 fine.
The auction process will last around 11 weeks at the latest. The landlord will be given a proposed agreement to the lease in the second week. The landlord can make representation in the 3rd week as to possible suitable high street use. There will be 6 weeks of marketing and bids must be submitted by the end of the 11th week. The landlord will be notified of the bids and will be given 2 days to tell the local authority of its choice which need not necessarily be the highest bid. If the landlord does not respond, the local authority can choose not to accept the bid. Otherwise they must accept the highest bid unless not reasonably practicable to accept. The landlord will have up to 3 months to bring up to standard at their own expense, including complying with a fire safety assessment, asbestos assessment, gas and electrical checks, removal of mould growth and water ingress. Completion will be within 10 working days of the landlords completing the works or earlier if the parties agree.

**THE AUCTION PROCESS**

**Preliminary Steps**

The local authority must instruct a qualified person to enter and survey the premises for the purpose of providing a schedule of works to raise the premises to a minimum standard (see below).

**Rental Auction: First Week**

Before the end of the first week the local authority must serve a notice of its intention on the landlord. As soon as possible after this they must undertake local authority enquiries in form CON29 but not optional enquires, local land charges search, drainage and water enquiries on CON29DW and a flood risk search.

**Second Week**

Before the end of the second week the local authority must serve a notice on the landlord requiring the following information unless the local authority consider it unnecessary or irrelevant in relation to the premises. This includes full and accurate response to enquiries, proof of landlord's title. It also includes the following certificates if available:

I. Current electrical installation certificate;
II. Current energy performance certificate;
III. Current water safety certificate;
IV. Current gas safety certificate;
V. Current fire certificate;
VI. Test certificate for mechanical, electrical or life safety systems.

If available a fire safety risk assessment and asbestos survey and asbestos management plan must be provided.

If the landlord fails to provide the information without reasonable excuse or provides false information, they may be prosecuted.

**Third Week**

If the landlord wishes to make any representations, then they must serve the use on the local authority before the end of the third week and the local authority must take these into account in deciding the terms of the contract and tenancy.

**Fourth Week**

The local authority must by the end of the fourth week serve the landlord with the auction pack. This will include the contract and terms of the tenancy, a brief explanation as to how the landlord's

representations have been taken into account, the information listed above, a marketing brochure, results of searches and any survey.

**Fifth – Tenth Week**

As soon as reasonably practicable in the fifth week the local authority must begin marketing with a link to the auction pack. This must be in a prominent position on the local authority website and also on a website which is one of the leading websites advertising commercial property for rent.
The local authority must continue marketing until the end of the tenth week. They must serve all valid bids on the landlord as soon as reasonably practicable after the end of the ninth week and in any event by the end of the tenth week. A valid bid must specify the annual rent bid exclusive of the VAT.

**Auction costs**

The local authority may require the successful bidder to pay them the legal costs of preparing the auction pack, search fees, and the cost of a survey. They cannot charge any other costs.

**LANDLORD WORKS**

The landlord will be required to obtain any consents in relation to landlord's required works to bring the property up to standard. They must use all reasonable endeavors to procure the works are completed within three calendar months of the date of the tenancy contracts. This period may be extended if such a provision is determined by a professional surveyor appointed by the landlord acting reasonably if there is a delay caused by an event which is beyond the landlord's control.

**Tenant's Remedies**

If the landlord does not comply with the above, then within five working days the tenant may claim liquidated damages of £55 per day or part of a day. The contract may also include provision allowing the tenants to serve notice on the landlord that they will carry out works and deduct the cost from the rent. If the landlord's works are not completed by 4pm on the last day of the period of six months starting with the date of the tenancy contract the tenant may serve written notice that unless the works are completed within twenty working days, they will terminate the contract.

**TERMS OF THE TENANCY**

If the landlord does not enter into the lease than the local authority can do so on behalf of the landlord but there must be a note in the lease to this effect. The lease will be for between one and five years and contracted-out of the Landlord and Tenant Act 1954.

**Tenants Obligations: The Rent**

This will be paid in equal monthly payments in advance on the first day of each month. There will be no right for the tenant to set off any payments.

**Repairs**
The tenant will be required to keep the premises clean, tidy and in not worse state of repair and decoration than that evidenced in a schedule of condition. The schedule of condition should be produced by the tenant as soon as reasonably practicable following the date of the tenancy. Within five working days of completion of the schedule of condition the tenant must supply the landlord with a copy. Within five working days of receipt the landlord may give the tenant notice that the schedule of condition is final and binding or may give the tenant notice that it is not agreed to be final and binding. If the latter occurs, the parties must in good faith try to seek agreement and reasonable variations of the schedule within ten working days. If there is no agreement a schedule of condition will be provided by an independent surveyor appointed by either landlord or tenant.

The landlord will have a right at reasonable times and on reasonable notice to examine, record, inspect, maintain or clean the property or make good any default by the tenant.

**Alterations**
There will be provision for the tenant not to alter the exterior of the premises expect for installing a sign for advertising. Internal alternations will be subject to landlord's consent.

**Use**
There will be a requirement that the tenant does not use the premises other than for permitted use identified in the particulars of the tenancy.

**Insurance**
The landlord will insure, and the tenant will pay a fair proportion of the costs incurred.

**Landlord's Obligations: Service Charge**
Where the premises form part of a building the local authority can include one of three obligations whichever they consider appropriate

1. The landlord keeps in repair the state of the building so as not to interfere with the tenant's ability to trade from the premises.

2. The tenant pays a fair proportion of the landlord's provision of services which will be determined by the landlord's surveyor.
3. Provision for a service charge substantially similar to the service charge contained in the landlord's own lease, other leases in the building or in the case of a shopping centre other leases in the centre or other leases of adjoining premises in which the landlord has an interest.

**RECENT COMMERCIAL LEASE CASE LAW**

**Landlord & Tenant Act 1954; When the Act Applies**

To come within the 1954 Act the tenant must occupy under a Lease at least partly for business purposes: S.23. In the case of ***Graysim v P&O Holdings Limited (1996)*** the House of Lords held that only one person can be in occupation at any time and in the case of a sub-letting this will usually be the sub-tenant. In the case of ***R (Annington) v Secretary of State for Defence [2023] EWHC 1155*** the Ministry of Defence had transferred its housing stock to Annington in 1996 for £1.662 billion and then obtained a leaseback for 200 years. They then sub-let to service families. Due to house price inflation this proved to be financially disastrous for them. They therefore served claims notices under the **Leasehold Reform Act 1967**. If there is a 1954 Act tenancy, they can only do this if they are resident. It was held that the 1954 Act did not apply as they were not residants as the service families were. The case was due to be heard by the Court of Appeal on July 25th 2024 but subsequently the parties entered into negotiations. On December 17th 2024 Annington agreed to sell back to the MOD 36,347 properties worth £8.1 billion for £5.994 billion thus eliminating the need to pay £230 million per annum rent.

In ***Royal Borough of Kensington and Chelsea v Mellcraft [2024] EWHC 539*** a flat where the director of a company lived was held to be occupied under a business tenancy as it was the only premises from which the business was run. If premises is mixed business residential then it will come within the Landlord and Tenant Act 1954 unless the business use is ancillary or a breach of user covenants. To avoid this a Home Business Tenancy may be created under the Small Business Enterprise and Employment Act 2015.

**Renewal terms**

S.35 of the Act states that in deciding the terms, in the absence of agreement between the parties you should have regard to the terms of the current tenancy. Whoever wants to change the terms faces a strong burden in doing so: See ***O'May v City of London Real Property Company [1983] 2AC726.*** The burden would be upon the tenant that this was fair and reasonable and reflected in a change of rent. ***WH Smith v Commerz Real Investmentgesellschaft (2021) April 19, county court***. The tenants had a lease of premises in a large shopping centre. They were able to remain open during the various lockdowns as the premises included a post office. On a lease renewal the landlord accepted that the new lease would include a rent suspension provision in the event of pandemic but only if the tenant's premises had to close. The tenant argued that their profits were much reduced due to lack of footfall in the shopping centre and therefore they wanted a rent suspension provision if any of the premises had to close due to pandemic. The county court judge decided for the tenant. This case may be instructive although a county court decision does not set a precedent.

The landlord wanted to introduce green lease clauses whereby the tenant would be responsible for providing and implementing an energy audit. The landlord failed on this.

In terms of setting the market rent, the passing rent was £953,000 based on a rent review in 2013. Because of market forces in the retail sector the landlord was arguing for a new rent of £751,995 and the tenant for a rent of £146,300. The court settled on a new market rent of £404,666. The rent was not increased because of the rent suspension provision.

In spite of this, in ***Poundland v Toplain (2021) July 2, County Court***, the court refused to change a rent suspension provision to include a pandemic clause. It also refused to include a provision whereby the right to forfeit for any breach would be suspended for the duration of any future lockdown. Following on from the House of Lords decision in ***O'May v City of London Real Property Company (1983),*** the starting point is that the new lease should be on the same terms as the current lease and the landlord would be unfairly prejudiced by any change. The case distinguished WH Smith on the basis that in that case the landlord was prepared to accept a pandemic clause but was disputing its extent.

***Clipper Logistics v Scottish Equitable (2022) County Court***. On a renewal the landlord wished to ban alterations which would bring the premises below an E rating in relation to energy efficiency. He also wanted to be indemnified for the costs of a new EPC if the tenant made alterations which adversely affected or invalidated the EPC and wanted to oblige the tenant to maintain the current EPC rating and return the premises with the current rating. The landlord lost on most of these and it was decided that the changes to alterations covenant were not needed anyway. The lease was changed in relation to returning the premises with the same rating.

***W (No. 3) GP v JD Sports (2022) County Court***. Here the court held that the Landlord and Tenant Act 1954 did not envisage the possibility of a turnover rent on a renewal as the new rent had to be a market rent and it would be impossible to ascertain which part was a turnover rent.

***B&M Retail Limited v HSBC Pension Trust (UK Limited) (2023) County Court.*** B&M had a twenty year Lease from 2000. The premises were outdated. HSBC entered into a conditional agreement with Aldi that on obtaining vacant possession they would be granted a lease and would redevelop although there was some evidence that they may be prepared to wait until 2029.

B&M served a S.26 request for a new lease. This was not opposed by the Landlord as they had problems with the post room during the lockdowns. They would have opposed underground F, demolition and reconstruction. The Court relied on the case of ***National Car Parks v Paternoster Consortium [1990] 1EGLR 99*** where the tenant was given a ten year lease but the landlord successfully included a rolling redevelopment break exercisable after two years by which time planning issues might have been decided. In the current case the tenant was given a five year Lease with a six month rolling redevelopment break exercisable immediately.

In ***Kwik-Fit Properties Ltd v Resham (2024) County Court K*** wanted a 15 year lease with break options every five years as they stated that this was company policy and also policy within the auto industry. The landlord objected as this would diminish the value of the reversion. The court stated that under ***O'May v City of London Real Property Company*** (above) it was up to K to show a good reason for a change on a renewal and there was no evidence of any policy on break clauses in the auto industry. For Landlords breaks as in ***National Car Parks***, (above) the Landlord had to show a real

possibility that development would occur within the lease term. The burden should be the same in relation to a tenant break and K could not show a real possibility of exercising a break. Moreover, a higher rent would not adequately compensate the Landlord.

***BMW (UK) Ltd v K Group Holdings Ltd (2023)*** the Landlord accepted a ten year lease but wanted a six month break exercisable between two and five years into the lease on the grounds that they may wish to run a business from the premises themselves. The landlord admitted that this was merely formative and that anything was possible in relation to the premises. They were refused the break.

**Grounds of Opposition**

***Gill v Lees News Limited [2023] EWCA 1178***. The tenant had leases of two shops North London. The Landlord opposed new leases on grounds (a), (b) and (c), serious repair, persistent delay in paying rent, some other breach. By the time of the court hearing the tenant has remedied the breach but at the time of the Landlord's S.25 notice the property had been in disrepair. On analogy with grounds (f) and (g) and the case of ***Betty's Café v Phillips Furnishing Stores (1959)*** the matter should be determined at the date of the court hearing. The Court of Appeal held that this was not the case and the matter could be looked into in relation to breaches throughout the duration of the lease. The grounds refer to the fact that the tenant "ought not to" be granted a new lease. It was held that the tenant needs should be taken into account as well as the Landlord's and as the tenant had learnt their lesson a new lease was ordered.

***Man Limited v Back Inn Time Diner Limited [2023] EWHC 363*** Here the tenant served a S.26 request which the landlord opposed on ground (f), intending to develop the premises into a multi-storey mixed use development. The landlord produced evidence of an ability to fund the development but as this was not provided until the start of the trial it could not be considered. They also produced evidence of ownership of other property which could be used as security but this was not clearly identified.

The High Court stated that there must be a realistic prospect of funding, similar to the test for obtaining planning permission. The landlords ownership of other properties may also be relevant. Here there was no realistic prospect and the landlord failed.

***Sainsbury's Supermarkets v Medley Assets (2024).*** Sainsbury's took a Lease of a four-storey building plus basement. They operated a supermarket on the ground floor, but the rest of the building was unoccupied apart from 26 metre² of the first floor. The Landlord opposed a new lease on ground (f), in tending to demolish and reconstruct. A week before the initial court hearing the tenant vacated the first floor. The Landlord intended to do work lowering the basement and widening a staircase on the first floor. As the tenant was not in occupation of any of the premises where work was intended the Landlord could not use ground (f). The tenant was entitled to a new lease of the holding and so could go back into occupation when the court decided the renewal terms.

In any case, the county court decided that the ground beneath the basement was not part of the demise and the work was not sufficiently significant to use ground (f).

***MVL Properties (2017) Ltd v The Leadmill Ltd (2025)*** here the Landlord opposed a new lease on ground (g) in that he wanted to carry out the same business of providing a music and entertainment venue. The court accepted that the Landlord could use ground (g) in these circumstances, see ***Humber Oil Terminal Trustees Ltd v Associated British Ports [2011] L&TR27***. The Landlord estimated

that they would be able to open the new venue within six months of the court order. This was accepted as being a reasonable time and in any case the fitting out of the premise would constitute occupation. The Tenant argued that losing their goodwill would be a breach of Article 1 of Protocol 1 European Convention of Human Rights and the right to possessions. This argument failed as the Tenant only had a contingent right to renew and in any case the Tenant's argument was not in the public interest.

Work must be started within a reasonable time of the end of the original lease which normally terminates after three months of the court order: S.64. In Spirit Pub Co. (Managed) ***London Ltd. V Pridewell Property Ltd. (2025)*** it was reasonable to commence redevelopment work fourteen months later. In addition, the tenant's refusal to grant additional rights of access to undertake preparatory steps to a planning application justified a longer time period.

**Misrepresentation**

***McDonalds Restaurant v Shirayama Shokusan 2024 UKHC 1133*** Here the Landlord successfully opposed a new lease in favour of McDonalds under S.30 (1) (g), intention to occupy for their own purposes. The premises would be run as a Japanese restaurant named Zen Bento. They undertook that they would open by November 2019 but did not open until March 2020 when due to covid restrictions it could only be used as a takeaway. They then closed but reopened in February 2021 as a different type of restaurant, coffee shop and bakery. McDonalds sued for misrepresentation under S.37 A of the LTA 1954 which states that if the court makes an order for termination of the tenancy which was obtained by misrepresentation or concealment of material facts the court may order the Landlord to pay compensation. It was held that this was the case here.

This seems strange as Ground (g) requires the Landlord to occupy for there own purposes and does not state the need for a specific purpose.

**LAW COMMISSION CONSULTATION ON RIGHT TO RENEW BUSINESS TENANCIES**

The first stage of consultation was produced on November 19th 2024 and the consultation period ends on February 19th 2025. Firstly, alternatives to contracting-out will be looked at as it is thought that contracting-out is costly to the landlord and may result in inadvertently allowing security of tenure when there are faults in the notices or when notices are not served on termination of the initial term. The possibilities are: mandatory security; abolition of security and the tenant relying on contractual options instead; keeping contract out; having to contract in.
When the Act applies, and when it is excluded will also look at with possible exclusion based on use of the premises, duration, existence of another regime or other characteristics such ass floor space, rent, or location.

**ALTERATION COVENANTS**

***Messenex Property Investments Limited v Lanark Square Limited [2024] EWHC 89***. This involved a former mixed-use property where the tenant was subject to covenants not to alter without consent, not to be unreasonably withheld. The Tenant wanted to add additional storeys and convert the whole premises into residential use. The Landlord refused consent and the Tenant sought a declaration. The Tenant failed on the grounds that they had not provided engineers drawings on request of the Landlord and had not given an undertaking as to the Landlord's reasonable costs. The Landlord failed in an argument that's consent would be refused as there was outstanding service charge liability. This was a separate issue. They also refused under grounds that part of the work would have involved a trespass onto the Landlords property. The Landlord had previously agreed to this.

**WAIVER AND FORFEITURE**

***Tropical Zoo Ltd v London Borough of Hounslow [2024] EWHC 1240.*** Here, the Council Granted T. a 125 year lease in March 2012. T. covenanted to build a zoo building within two years. They also covenanted that they would remedy any breach notified to them by the Council within two months. The zoo building was not built but T. continued to pay the rent. In November 2020 the Council commenced forfeiture proceedings. Their agents were instructed to return any rent payments immediately but did not do so on two occasions. T. claimed that by acceptance of rent there had been a waiver on the right to forfeit. The Court held that the ability to serve two months notice meant that the breach was ongoing, and waiver had not occurred at the time of commencement of proceedings. The agents were merely exercising a treasury function and the fact that the rent had not been returned promptly was not binding on the Landlord.

***Sik v Malik [2025] EWHC 383.*** The Landlord peaceably re-entered premises due to non-payment of rent. The Tenant was granted relief from forfeiture in the lower court on the basis that the Landlord would be entitled to all rent owed before the re-entry and 50% after the entry. The Landlord was also told to pay 50% of the Tenants costs. On appeal both of these were overturned. As in ***Barton Thompson v Stappling Machines [1966] Ch499***, payment of arrears in invariably a condition of relief of forfeiture.

**SERVICE CHARGE LIABILITY**

In the case of Sara and ***Hossein Asset Holdings v Blacks Outdoor Retail [2020] EWCA 1521*** a landlord's certificate in relation to service charge was stated to be conclusive as to liability. The Court of Appeal held that this applied to both the itemised works and total amount. The clause was clear and unambiguous and could not be contested.

The Supreme Court have now heard this case ***[2023] UKSC 2***. The Tenant had to pay the service charge. If they objected to the amount they would have to bring a separate court action.

In ***Criterion Buildings v McKinsey & Co [2021] EWHC 256*** the landlord successfully claimed £2.2 million plus interest of service charge arrears. The lease stated that the tenant would pay a "due proportion" of the service charge as determined by the landlord. The court decided that as long as the lease covered the works done the landlord's determination would be conclusive save in exceptional circumstances.

***Tower Hamlets London Borough Council v Long Leaseholders of Brewster House and Maltings House [2024] UKUT 193*** The case concerned two blocks of flats originally constructed as council housing in the early 1960's. Some of the council tenants had purchased long leases under the right to buy provisions. The blocks had been constructed with a Large Panel System which subsequently was found to be defective and remedial works was done over the years. After Grenfell inspection of the blocks showed ore defects and remedial work would cost over £9 million. The service charge allowed the Landlord to charge for repair and maintenance and there was also a sweeper provision. The other tribunal held that repair and maintenance did not cover structural defects and the Leaseholders did not have to pay.

It should be noted that short-term leases of dwellings of less than 7 years, the Landlord cannot charge for repair to the structure and exterior under **S.11 Landlord and Tenant Act 1985** but by buying under right to buy the Leaseholders may be charged depending on the wording of the service charge.

**REPUDIATORY BREACHES**

***Ramsbury Properties Ltd v Ocean View Construction Ltd [2024] UKDC40*** the case was heard by The Privy Council. Premises on the island of Nevis in the Caribbean. OV had entered into a 7 month lease to house 250 workers as sleeping accommodation whilst they repaired a nearby hotel which had been damaged by a hurricane. When the workers entered the premises, they were not allowed to eat there and there were no drying facilities and inadequate air conditioning. For a repudiatory breach to occur, the breach must be sufficiently serious. They vacated the premises and stated they would not be bound by the lease and they were rescinding the contract. A previous case of ***Total Oil v Thompson Garages [1972] QB318*** had stated that normal contractual remedies would not be available in relation to leasehold premises of land although this was subsequently doubted in other cases. For instance, in ***Smith v Marrable (1843)*** it was implied that furnished accommodation should be fit for human habitation at the beginning of the lease. As the premises was infested with vermin, the tenant could rescind the lease.

In ***Nynehead Properties v R.H. Fibreboard Containers [1999] 1EGLR7***, occasionally allowing loading bays to be blocked was not sufficiently serious. In the present case, it was held that the landlord's breach of quiet enjoyment was sufficiently serious to rescind the contract.

**DAMAGES FOR TRESPASS**

***Restaurant EC3 v Tavor Holdings [2024] EWHC3104***. The case involved Simpson's Tavern in the City of London. The tenant had fallen into arrears of rent during the lockdowns. The landlord peaceably re-entered the premises and the tenant sought damages for trespass. It was held that the tenant could not claim for lost profit as the business was carried out by a connected company. In relation to damages, then any rent which they had not paid would have to be set off against the claim. As the passing rent was the same as the market rent, there were no damages here. The case is unusual as the tenant had contracted the running of the premises to another company. Also if market rent have had been higher than the passing rent, then the tenants could have claimed the difference. ***In Smith v Khan [2018] EWCA1173*** the Court of Appeal allowed damages for inconvenience and mental distress. However, this involved a residential lease and was held not to be applicable for commercial property.

**PROBLEMS WITH MIXED-USE PREMISES**

Currently, under s.4 Leasehold Reform (Housing and Urban Development) Act 1993, residential long leaseholders can collectively enfranchise a block or exercise a Right to Manage if 25% or less, excluding common parts, is occupied by non-residential tenants. Under s.29 Leasehold and Freehold Reform Act 2024 this will go up to 50%. The provision came into force for RTM companies on March 3rd 2025. Enfranchisement is undergoing judicial review with an expected hearing in July 2025.

**BUILDING SAFETY ACT 2022**

**Higher-Risk Residential Buildings**

The Act has also introduced the Building Safety Regulator who will be a part of the Health and Safety Executive. They will have a general role in relation to building safety, but will also be responsible for building control in high risk residential buildings. In England a high risk residential building is one with at least two dwellings which is at 18 metres or more in height or, if less than 18 metres, which has 7 or more storeys. Such a building will have an accountable person who has a legal estate in possession in the common parts or is responsible for repair of the common parts. This will include any Right to Manage Company and any Residents Management Company if there is more than one accountable person then there will be a principal accountable person. A residents' panel must be constituted and the accountable person must listen to health and safety complaints. They will have to produce reports to the Regulator and keep records in relation to health and safety and report any fire safety or structural safety problems that have occurred. Originally, there was meant to be a Building Safety Manager who would be an intermediary between the building safety regulator and the accountable person. This was dropped due to cost. Also, the original Bill provided for a building safety charge whereby any costs could be charged to the long leaseholders. This was also dropped and any charges will now be covered by the service charge.

The accountable person will have access rights to individual flats on giving at least 48 hours' notice. If there is more than one accountable person, there will be a principal accountable person. They will have an interest in possession of the structure and exterior or be responsible for repair and maintenance of the structure or exterior of the building. There are also offences if anyone removes or disturbs a relevant safety item. Any high-risk buildings must be registered with the Building Safety Regulator. This came into force in England on April 6th 2023 and the principal accountable person will have to register the building with the Regulator by October 1st 2023. Guidance suggests that the registration must be approved by the Regulator and key building information provided by this date. The Regulator will then have to approve the registration.

Safety case report summarising major fire and structural hazards and risk management is mandatory for higher-risk buildings. Organisations must also establish a mandatory occurrence reporting system detailing communications with other accountable persons, arrangements for reporting to the Regulator and summaries of incidents.

In England, the provisions came into force on April 6th 2023. **The Building Safety (Registration of Higher-Risk Buildings and Review of Decisions) (England) Regulations** were introduced into parliament on March 9th 2023. There will be a registration fee of £251 which must be paid on the application. For new builds then the accountable person will commit a criminal offence if they allow anyone into residential occupation before completion certificates are available. This will include adding new residential units and doing work that results in the building becoming Higher-Risk. The principal accountable person will have to register the building with the Regulator within six months otherwise they will commit a criminal offence.

There are also **Higher-Risk Buildings (Key Building Information) (England) Regulations 2023**. Within 28 days of an application the principal accountable person must provide details as to use of the occupied building, any attachments or outbuildings, details of materials used, information about structure, storeys and staircases, energy supply and storage and emergency evacuation plans.
There are also **Higher-Risk Buildings (Descriptions and Supplementary Provisions) (England) Regulations 2023** which were laid in front of Parliament on March 6th 2023. A Higher-Risk Building is one which is 18 metres or more in height or has seven or more storeys. Any floor where the ceiling is below ground level will not be included, nor will any top floor which only includes rooftop plant and machinery. The measurement will be from the lowest part of the ground floor to the finished floor of the top floor. A mezzanine floor will be ignored if it is less than 50% in size of the largest storey vertically above or below it. A separate structure will be treated as being the same building if it can be accessed to another part which has a residential unit. This will not apply if the access is only intended for exceptional use for emergencies or maintenance. In the case of ***Waite v Kedai (2023)***, the first measurement of the building was stated to be 17.57 metres, the second measurement was 17.97 metres with a margin of error of 30 centimetres. It was later decided that a roof terrace was the top of the building. This caused it to be well beyond 18 metres in height. As a consequence of this case the RICS told members not to state the height of the building. In the first-tier tribunal decision of ***Smoke House and Curing House, 18 Remus Road, London E3 2NF,*** it was decided that a roof terrace constituted a storey thus making the property a higher-risk building which would need to be registered and also have the regulator oversee any building work. This conflicts with the Government guidance which states that a storey must be fully enclosed although this seems to be wrong. On October 4th 2024 the Ministry of Housing and the Building Safety Regulator stated that the guidance should still be followed unless they say otherwise.

There are also **Building Safety Act 2022 (Consequential Amendments etc) Regulations 2023** which intend to pass building control in higher-risk buildings to the building safety regulator.
Five further sets of regulations came into force in England on October 1st 2023. These mainly affect construction law and not conveyancing but the regulator is now the primary body in relation to building control of higher-risk. If the building work was commenced prior to October 1st the developer has six months to complete and will be in the old regime as long as they do so.
Although the legislation will apply to Wales, the ability to decide on the height of the building has been delegated to the Welsh Government where the consultation came to an end on May 12th 2023. The proposal is that a higher-risk building will have the same definition as in England but may only need to include one dwelling. In November 2023 the Welsh Government announced that the legislation on Higher-risk Buildings would only apply to the design and construction stage and not to occupation.

S.112 of the Act implies various terms into a residential lease. The Landlord must co-operate in relation to building safety and the Tenant must also co-operate, allow access at a reasonable time on giving 48 hours notice, allow works to be done on the premises, and any building safety costs can be added to the service charge. Law Society Guidance suggests that this should be made clear to the leaseholders and also the fact that they will be liable in relation to a residents management company. It is suggested that similar terms may be expressly included in a commercial lease. They are as follows:

(a) Where the Landlord is an accountable person they will comply with their building safety duties;

(b) to cooperate with any person in connection with a relevant person complying with their building safety duties;
(c) Where a special measures order in relation to a higher-risk building is enforced to comply so far as it relates to the landlord.

The tenant will allow the landlord, a relevant person or a person authorised in writing by the landlord or a relevant person to enter the premises at a reasonable time on 48 hours notice for:

(a) relevant building safety purpose;

(b) to comply with any special measures order in so far as it relates to the tenant.

Cooperation includes providing any information which is reasonably required in connection to the relevant building to comply with their building safety duties. Relevant building safety purpose means (a) inspecting the premises in connection with a relevant person complying with their building safety duties;

(b) carrying out works to the premises where such works are required to be carried out in connection with a relevant person complying with their building safety duties;

(c) inspecting that part of the building in relation to building safety duties and carrying out works where such works are required to be carried out in connection with building safety duties.

Disclosure of information is not required if the disclosure would come with the data protection legislation.

The section also allows costs to be added to service charge regardless of what the lease says. A tenant might wish to resist this.

There is also provision that the landlord should provide a relevant information when rent or service charge is demanded. Relevant building safety information means:

(a) The fact that the premises consists of or include a unit in a higher-risk building

(b) The name of the principal accountable person, special measures manager and the regulator

(c) An email address and telephone number for such person

(d) Postal address in England and Wales for such person

Problems may arise on a Landlord and Tenant Act 1954 where, under S.35, the court has to have regard to the terms of the current tenancy: ***See O'May v City of London Real Property Company Limited [1983] 2AC726*** see also ***WHSmith v Commerz (2021)*** and ***Clipper Logistics v Scottish Equitable (2022)*** where the county court refused to insert green lease clauses on a lease renewal.

The CPSE 1 enquiries now have questions in relation to higher-risk buildings (see below). One problem is that registration of a higher-risk building does not seem to be possible after October 1st 2023. It is suggested that enquiry must be made as to whether registration has occurred for an existing building and whether the Regulator has accepted the application whenever purchasing the reversion of an existing higher-risk building. It is also suggested that there should be an enquiry for new higher-risk buildings as to whether anybody has been allowed into residential occupation prior to the provision of a building control certificate. Enquiry should also be made as to the height of the building and when the building was completed. The register of Higer-risk buildings became available to the public on February 8th 2024 and can be found on the Health and Safety Executive website. Separately, although there are provisions that leaseholders of residential units must on 48 hours notice allow accountable persons to inspect the premises, there is no such provision in relation to commercial units. It is suggested that in future commercial leases include clauses allowing the accountable person to inspect premises on giving notice, to inspect documents related to health and safety and requiring the leaseholder to notify the accountable person of any health and safety issues. This would include leases, for instance, of roof space to communications operators. It is suggested that enquiry must be made in relation to higher-risk buildings in residential conveyancing. This might be based on the CPSE Enquiries for commercial properties although enquiry 15.5 and 15.6 will not be relevant until later this year and 15.7 is not relevant to residential premises.

**CPSE 1 Enquiries Version 4.0 Enquiry 15**

**15.1** Is the Building (or will it be, when fully built and occupied) a "higher-risk" building as defined by section 65 of the BSA?

If the answer is yes, then please answer enquiries 15.2 to 15.7. If the answer is no, then please go to enquiry 16.1 below.

**15.2** Who is or are accountable person(s) in relation to the common parts of the Building? Which one of them is the principal accountable person?

**15.3** Are you aware of any breach of, alleged breach of or any claim under the BSA, or any regulations made under it, in relation to the Building?

**15.4** Please provide a copy of the entry relating to the Building in the register kept under section 78 of the BSA.

**15.5** Please provide a copy of the most recent building assessment certificate (if any) relating to the Building.

15.6 Please (a) confirm that the following documents have been compiled and kept up to date; (b) advise where and when they can be inspected; and (c) (where the Buyer will become an accountable person in respect of the Building) confirm that the originals will be handed over on completion:

(i) all safety case reports (section 85)

(ii) all prescribed information (section 88(1))

(iii) all prescribed documents (section 88(2))

(iv) the residents' engagement strategy (section 91)

(v) any request made under section 92, and any information provided in response to such request

(vi) any relevant complaints (section 93)

(vii) any contravention notices (section 96)

(viii) any outstanding requests to enter (section 97).

Note: section references above are to the BSA.

**15.7** Please give the name and contact details of a senior individual within the Seller who deals with BSA issues in relation to the Building; and confirm that the Buyer may make contact with that person in order to obtain information about BSA issues in relation to the Building.
There is no ability to question the reasonableness of service charge in commercial lease as there is under Landlord and Tenant Act 1985 as there is for residential. A disputes resolution clause is needed and tenants need to be warned of potential service charge liability. See:

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