Growing your knowledge
Our Real Estate Dispute Resolution update (UK)
Welcome to the Spring 2023 edition of Eversheds Sutherland InFocus.

In this issue we look at:

- Horizon scanning – what legal changes or updates we can expect to see over the coming months
- We revisit the principles of Mannai in saving defective notices
- Rent free periods
- Reflections on the COVID arrears arbitration scheme awards and impact of the scheme
- Adverse possession
- The Supreme Court settles a longstanding commercial service charge dispute
- Forfeiture of a lease call option
- Statutory compensation under the Water Industry Act 1991
- Rateable values
- A round up of the key developments in Scotland and Wales
Including a review of these cases, and what to expect in 2023, this edition focuses on:

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Please do contact any member of the team if you would like to discuss any of the content in this edition further.
WHAT’S ON THE HORIZON FOR 2023?

1. Vodafone Ltd v Gencomp (No 7) Ltd and AP Wireless II (UK) Ltd [2022] UKUT 223 (LC) – The Court of Appeal is due to hear the appeal in this telecoms matter on 10 May 2023. The Upper Tribunal had determined that landlords of operators who had become landlords by way of overriding or concurrent leases from the original site provider are not able to terminate an operator’s rights under the Electronic Communications Code.

2. Energy Efficiency (Private Rented Property) (England and Wales) Regulations 2015 – From 1 April 2023, landlords will be prohibited from continuing to let commercial properties in England and Wales which have an EPC rating of F or G unless an exemption applies. The prohibition already applies to the granting of new leases of commercial properties and to the granting of new leases and continuing to let residential properties.
Renting Homes (Wales) Act 2016 – this Act became law in December 2022 and constitutes a significant reform to residential tenancies in Wales. The Act applies to most tenancies and licences of residential tenancies in Wales although, some of the duties placed on landlords will only become mandatory in June 2023 (insofar as they relate to tenancies that were already in existence when the Act came into force). Our article on this can be found at page 31.

Building Safety Act 2022 – The Act received Royal Assent on 28 April 2022 and although a number of its provisions came into force immediately or on 28 June 2022, we still await a number of the regulations which will bring into force the remaining provisions of this Act and/or clarify some of its terms. The Act introduced a regulatory scheme with the aim of improving the safety of certain buildings. Landlords and tenants will, in particular, be interested to understand how the First Tier Tribunal use their new powers to grant Remediation Orders and Remediation Contribution Orders.

Stonegate Pub Company Ltd v Ms Amlin Corporate Member Ltd, Liberty Mutual Insurance Europe SE & Zurich Insurance PLC [2022] EWHC 2548 (Comm); Greggs PLC v Zurich Insurance PLC [2022] EWHC 2545 (Comm); Various Eateries Trading Ltd v Allianz Insurance Plc [2022] EWHC 2549 (Comm) – Last year the tenants in this case were unsuccessful in these claims involving business interruption insurance. The Stonegate decision was treated as the ‘lead’ case, and the three cases were sufficiently similar to be dealt with within the same hearing. Stonegate has appealed and the appeal hearing is due to be heard by 13 December 2023. The outcome of the appeal could affect the other judgments and the sector generally.

Rateable values for non-domestic properties in England and Wales – the rateable values for all business properties and all other non-domestic properties in England and Wales have been revised and the new rates will be in place from and including 1st April 2023. The rateable values for businesses are used to calculate business rates and also other sums such as statutory compensation under the Landlord and Tenant Act 1954. The rates will vary depending on whether your property is based in England or Wales. Our article on the development can be found at page 32.
LOOKING BACK – COVID RENT ARREARS AND THE ARBITRATION SCHEME

Commercial Rent (Coronavirus) Act 2022

23 September 2022 was the last date that referrals could be made under the scheme introduced by the Commercial Rent (Coronavirus) Act 2022 (the 2022 Act). The scheme was aimed at resolving disputes in respect of certain protected rent debt which had to have accrued during the period protected by the 2022 Act. The scheme was not open where the parties had already reached an agreement in relation to payment of the rent arrears.

By the time the scheme came into effect in March of last year, it was clear that it would only apply to a fairly limited number of disputes. This has become evident by the relatively small number of referrals made and awards subsequently published under the scheme. The majority of which have been issued by Falcon Chambers Arbitration

Although the deadline for the referrals has passed, some of the referrals made prior to this date are being considered and new awards continue to be published. In this section we set out some of the awards that have been made to date and some of the key points arising from them.

The Awards:

Both landlords and tenants have taken advantage of the arbitration scheme. Although it is difficult to find a clear trend given the modest number of awards it is landlords who have been most successful.

Procedural decisions and preliminary issues:

A number of the awards published under the scheme have been of a more procedural nature or, particularly in relation to some of the earlier awards, dealt with preliminary issues. The arbitrators were often tasked with determining whether the 2022 Act applied to the debt at all in various circumstances:

- In Signet Trading Limited and Fprop Offices (Nominee) 4 Limited and Fprop Offices (Nominee) 4 Limited (5) Limited the tenant sought relief relating to approximately £448,000 of rent arrears. Its referral was dismissed, with no rent relief given. The arbitrator concluded that offices were not subject to formal Closure Requirements under the Act, and therefore the rent in question was not Protected Rent Debt under the scheme. The tenant had tried to argue that the head office premises were subject to a Closure Requirement, because the purpose of its head office accommodation was to support the retail business that itself was subject to a Closure Requirement.
– in *Stratford City Shopping Centre (No.2) Nominee A Limited (Company number 06530663) and Stratford City Shopping Centre (No.2) Nominee B Limited (Company number 06530613) and Newspoint (Stratford) Limited* the key preliminary issue for determination was whether or not there was a binding agreement between the parties in relation to the rent arrears in question. The tenant asserted, and the landlord denied, that the parties had agreed a 100% rent reduction and therefore, as there had been an agreement, the arrears could not fall within the protection of the 2022 Act. In support of its position, the tenant referred to a letter from the landlord marked without prejudice and subject to contract. The arbitrator found, however, that no agreement had in fact been reached pointing in particular to the fact that the offer was conditional (and those conditions hadn’t been met) and also that the offer had not been accepted. In its final award in this dispute the arbitrator favoured the landlord’s proposal which gave the tenant time to pay the arrears. The tenant was required to reimburse the landlord for three-quarters of the arbitration fee, partly because the tenant had raised and lost on the preliminary issue.

– failure to comply with the mandatory procedural steps set out in s.11 of the 2022 Act has led to the dismissal of a number of referrals. In *Hanbury Print. com Limited T/A The Print Team v Serge and Vivienne Primack*, the arbitrator dismissed the tenant’s reference. The arbitrator found that the tenant had failed to follow the mandatory arbitration procedure – in particular it had failed to file a formal proposal under s.11 of the 2022 Act. The arbitrator was not persuaded by the tenant’s argument that the settlement proposals made in its letter of notification to the landlord was their formal proposal.
Tenant viability:

Procedural issues aside, the key consideration for the arbitrators when reaching their decisions, was that any award issued should preserve the viability of the tenant’s business in a way that was consistent with preserving the landlord’s solvency. Whether the tenant was viable, or at least whether it would be viable but for the protected rent arrears was therefore crucial. The awards below illustrate the type of points which have arisen:

- the scheme encourages parties to agree as many issues as possible before the matter is subject to arbitration. In KXDNA limited and 60 SA limited the parties had already agreed: a) that the tenant’s business was viable (with section 13(2) of the Act); b) that the rent of almost £2 million in question was Protected Rent Debt as defined; and c) that the only issue to be determined was the rent relief, if any, to be granted. The arbitrator commented that in the absence of such agreement, she would have had real doubts on the tenant’s viability and Protected Rent Debt points in this instance. This was because the parties had assessed the ‘business of the tenant’ based on the business operated by the group of companies of which the tenant forms part, and not of the tenant named on the lease (and applicant) which is a dormant company. It was the landlord’s proposal which the arbitrator found to fall within a range of awards which could satisfy the requirements of s.15 of the Act

- in TPIF (Portfolio No.1 GP) LLP TPIF (Portfolio No.1) Nominee Limited and Nuffield Health the tenant chose not to submit a formal proposal or engage with the arbitration. As such, the arbitrator only had limited evidence of tenant viability put forward by the applicant landlord and the landlord’s final formal proposal. Although viability is to be assessed as at the point of time the assessment is being carried out (i.e. in this case around October 2022) the arbitrator was satisfied that the tenant’s publicly available accounts from October 2021 demonstrated that: (1) the tenant was viable at that point; (2) that indications made in that report led him to assess that the tenant remained viable at the point of the assessment in October 2022; and (3) that the tenant would remain viable if it was ordered to pay the full debt immediately (as required by the landlord’s proposal). The award therefore required the tenant to pay the debt in full immediately. In his second award issued in this dispute the arbitrator chose to depart from the default position (i.e. that both party pay arbitration costs on a 50/50 basis) and ordered that the tenant pay the arbitration costs in full (in this case £6,100 plus VAT), as it had acted unreasonably having failed to engage at any stage and thus having effectively bound the Applicant to pursue what was, in the event, a one-sided arbitration

- in The Entertainer (Amersham) Limited and British Overseas Bank Nominees Limited and WGTC Nominees Limited the arbitrator concluded that the tenant’s financial evidence demonstrated that it could meet its contractual liabilities and pay the arrears in full (it had already paid 50% of rent payable during the protected period and was requesting relief in relation to part or whole of the balance). The arbitrator took the view that an arbitrator is required to have regard to the tenant’s business as a whole and not just a specific store

- in Hyde Park South Limited and Royal Commission for the Exhibition of 1851 the arbitrator concluded that relief was to be given for approximately £197,000 of protected rent debt. The tenant had originally sought relief in the form of a 100% write off but then revised this and proposed that 80% of the debt be written off. In contrast the landlord had initially offered to accept payment (in full) over two years and then offered a £50k write off with the balance to be paid in instalments over two years. In reaching her assessment the arbitrator found for the tenant, stressed that preserving the tenant’s viability was not the same as seeking to allow it to return to pre-Covid profitability
– in the first of two other RICS awards (both published in anonymised form) the arbitrator decided to adopt the proposal put forward by the landlord, which offered a modest write off of debt. Relevant to the conclusion reached was that the tenant business remained in profit throughout the pandemic and that would have been the case even had the full rental payments been made. Reference was also made to grants received by the tenant during the pandemic.

– in the second RICS award, the arbitrator identified that they had found it difficult to reach a decision due to the fact that the tenant had failed to provide evidence in the form of accounts or as to the losses incurred during the relevant protected period. The arbitrator had been told, however, that the tenant had received financial assistance from the local authority which would have mitigated their losses. The arbitrator therefore awarded relief in the form of 50% write off of the sums in dispute.

What now?

The arbitration scheme introduced by the 2022 Act had a fairly nominal impact tenant disputes. In all likelihood, the more significant element of the scheme was the breathing space offered to tenants by the restrictions it placed on landlords’ ability to take certain enforcement action. Those restrictions were lifted on 24 September 2022, save where an arbitration was still ongoing. Our article on the lifting of the moratorium and the enforcement options available to landlords can be found at: Lawbite: Tick tock – The clock is ticking on the Coronavirus rent arbitration scheme – so what next?

Those businesses which survived the pressures caused by the pandemic now face other pressures in the form of inflation rises, energy costs soaring and interest rate rises; covid rent arrears may therefore be the least of some tenants’ problems. Lisa Barge and Andrew Todd recently wrote an article that was published in The Times commenting on the insolvency struggles faced by businesses in the current climate- the link to that article is here.
INCAPABLE OF LAWFUL USE?


This Court of Appeal decision relates to two appeals by cinema-operator tenants and their rent arrears accrued during the Covid lockdowns.

The tenants lost on all grounds, so the summary judgments against them for payment of the arrears still stand. This is another good news story for landlords recovering rent falling due during the pandemic lockdowns.

The appeals

The tenants had contended that rent (and service charge) should not be payable during the period within which the cinemas were compelled to close by law. They asserted that:

- the premises were incapable of lawful use for their intended purpose; the use as a cinema was fundamental to the lease and when the buildings could not be used as a cinema there was a total failure of basis / consideration, so no rent was due; and

- it should be implied into the leases that the rent would be suspended if there was a compulsory closure

One tenant raised an additional argument that the premises were ‘damaged’ and ‘not fit for occupational use’ in financial terms (rather than physically) and therefore the rent cessor clauses related to property damage were triggered, and rent was not due.

The Court of Appeal’s stance

- the Court of Appeal agreed with the landlords that the rent was payable regardless of whether the premises could be used for their permitted use. The tenants had continued to have exclusive rights to the premises during the terms of the leases. The Court of Appeal rejected the ‘failure of basis’ argument because it would involve a reallocation of the risk the parties had freely negotiated

- for a term to be implied into a lease that term must be required to give the lease “business efficacy”, or that it can be said that the implication is so obvious that it goes without saying that is accounts with the parties’ intentions. The Court found that, here, no terms needed to be implied to give the leases efficacy. Indeed, the proposed implied terms were in conflict with express terms. The leases provided that the landlord gave no warranty on whether the tenant could use the premises for the permitted use, so the risk had been allocated already on this

- the Court also found that ‘property damage’ in the lease meant only physical damage, so that the rent cessor clause could not be relied upon
Key points

- The issues raised in these cases have led to parties in lease negotiations seeking express clauses on pandemic protection and force majeure to cover this type of situation.

- The Court did not shut the door entirely on the ‘failure of basis’ argument. The argument in these appeals failed because of the specific wording of the leases, but the Court acknowledged that there may be other circumstances in which the argument may succeed, although the likelihood of the right circumstances being present are very limited.

- These cases were initiated before the arbitration scheme under the Commercial Rent (Coronavirus) Act 2022 was introduced to address arrears accrued during the Covid pandemic.

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A DIFFERENT POINT OF VIEW: ‘OVERLOOKING’ CAN BE A NUISANCE

Fearn and others v Board of Trustees of the Tate Gallery [2023] UKSC 4

The Supreme Court has handed down its long awaited decision in this case involving overlooking from London’s Tate Modern viewing gallery. The claim is significant as the Supreme Court (by a majority of 3:2) allowed the appeal and in doing so confirmed that ‘overlooking’ can be an actionable form of nuisance. The case will now return to the High Court who will determine the appropriate remedy. The decision will be of particular interest to landowners and developers.

The owners of four luxury flats in the prestigious Neo Bankside development adjacent to the Tate Modern sought an injunction. Their aim was to restrict the use of the Tate’s 360 degree viewing platform on the 10th floor of its Blavatnik Building to prevent visitors ‘observing’ them in their flats. Alternatively, they sought damages for this intrusion.

The platform was designed to afford visitors to the Tate a panoramic vista over London, but incidentally also afforded a direct view into a number of flats in Neo Bankside. The owners of the flats complained that they were subject to being “more or less constantly watched”, with Tate visitors using binoculars to peer into the flats, taking photographs, waving and occasionally making obscene gestures.

The High Court dismissed the residents’ claim when they considered the matter in 2019. It determined that, whilst ‘overlooking’ was an actionable form of nuisance, there was no nuisance in this case. It felt that, in effect, the ‘price’ that the owners of the flats paid for the views afforded by the glass-frontage to their flats was that it necessarily exposed them to increased privacy sensitivity.

The Court of Appeal dismissed an appeal made by the residents and further decided (disagreeing with the High Court on this point), that overlooking by neighbours is not capable of giving rise to a cause of action in private nuisance.

The Supreme Court reviewed the law and concluded (by majority of 3:2) that the residents did in fact have a claim under common law nuisance.

In delivering the leading judgment (with which Lord Reed and Lord Lloyd-Jones agreed) Lord Leggatt likened the residents’ living circumstances as oppressive and like “living in a zoo”. He had no doubt that the nature and extent of the viewing of their flats went far beyond anything that could reasonably be regarded as a necessary or natural consequence of the common and ordinary use and occupation of The Tate’s land. Further, the court determined that the viewing and photography caused substantial interference with the ordinary use and enjoyment of the residents’ properties.

The question of what remedy will be imposed has returned to the High Court for consideration. It therefore remains to be seen whether the residents will be awarded an injunction preventing the use of the viewing platform, whether The Tate will be subject to mitigation criteria, and/or instead whether the residents will receive only compensation.
Key points

- ‘overlooking’ is actionable in nuisance
- we may well see further claims based on nuisance where one party is overlooked from another building. However, careful advice should be taken before issuing such a claim, as there could well be many distinguishing factors
- it is important to remember that it is no defence in nuisance claims to say that the complaining party has ‘come to the nuisance’ – i.e. has moved into a property knowing that a neighbour carries on a particular activity which might create annoyance. As such, the question of who was there first was irrelevant –
- it appears that neither the Tate Gallery developers nor the Neo Bankside development had considered the effect of the viewing platform or foreseen the level of intrusion, suggesting that a better dialogue at an early stage may have been helpful
- there was no need here to invoke human rights law (in particular Article 8 of the European Convention on Human Rights) - the principles developed under common law being said to be sufficient to determine when liability arises in a dispute of this kind

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‘PAY NOW, ARGUE LATER’ – THE SUPREME COURT SETTLES A LONG RUNNING SERVICE CHARGE DISPUTE

Sara & Hossein Asset Holdings Ltd -v- Blacks Outdoor Retail Ltd [2023] UKSC 2

The Supreme Court has dismissed Blacks’ appeal in this long running dispute between it and its former landlord. The dispute turned on the interpretation of service charge provisions in two successive leases of retail premises in Liverpool and whether charges raised by the landlord were payable.

Blacks originally occupied retail premises in Liverpool (the Premises) under a 10 year lease which was terminated early pursuant to a break option and the parties then entered into a second one year lease of the Premises which expired in May 2019.

The service charge provisions in both of the successive leases required that the landlord supply the tenant, on a yearly basis, with a certificate as to the "total cost and the sum payable by the tenant" and that this certificate was to be ‘conclusive’ in the absence of "manifest or mathematical error or fraud".

The tenant failed to pay the service charge for the periods 2017/19 and 2018/19, with the service charge for the 2017/18 period alone amounting to over £400k. Blacks claimed that the sums were excessive and included sums not due under the leases.

When the matter came before the High Court, the court found in favour of the tenant’s interpretation of the service charge provisions. It determined that the certification was conclusive only as to the amount of costs incurred by the landlord but not as to the tenant’s service charge liability. It was therefore open to the tenant to challenge the demand.

The Court of Appeal disagreed. It allowed the landlord’s appeal and ordered summary judgment in the landlord’s favour. It determined that the natural meaning of the relevant provisions was that the certification was conclusive of (i) "the amount of the total costs" and (ii) "the sum payable by the tenant".

The latest decision from the Supreme Court settles the matter. It found that the natural and ordinary meaning of the certification provision supported the landlord’s case that payment for the sum sought was due and payable. The tenant’s interpretation, which would allow the tenant to challenge payment of the service charge, would undermine the commercial purpose of the provision being to enable the landlord to recover the costs and expenses it has incurred without significant delay or dispute.
Key points

- this decision represents a compromise and tries to balance the interests of both the landlord and the tenant. The landlord will get paid promptly as there is a clause in the lease preventing set off (as there usually is), but equally the tenant does not lose the ability to raise a claim for reimbursement if it considers the landlord has claimed sums which are not properly justified under the lease.

- some may consider that this interpretation of the provisions represents a departure from a literal interpretation and it is possible off of the back of this decision that other tenants may seek to reclaim sums it otherwise thought it has no choice but to pay pursuant to similar provisions.

- that said, careful consideration will always be needed as to the exact terms of the lease, in any given scenario, and the precise wording of what can and cannot be recovered by the landlord under the service charge.

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However, the court also emphasized the fact that the certificate was conclusive as to the amount and the sum payable by the tenant did not mean that it was conclusive as to the underlying liability as to the service charge. The clause is not a ‘pay now, argue never’ provision but rather a form of must pay now, but can argue later provision.

On this interpretation, a balance was struck: the tenant is liable to pay the sums certified (without set-off) which is key for the landlord’s cash flow; but is not then precluded from disputing liability and to seek repayment of any costs which it contends have been improperly charged.
THE COST OF POOR SERVICE

OG Thomas Amaethyddiaeth v Turner & Ors [2022] EWCA Civ 1446

In recent years the Courts have applied the Mannai test to save a range of errors on contractual notices on the basis that the ‘reasonable recipient’ would not have been misled by the error. Anyone serving contractual notices should be aware that whilst errors of expression can still be saved by the Mannai test, errors of substance (such as the identity of the recipient) will not. In this case, the court gave particular thought to the words ‘given to’ under s.26 of the Agricultural Holdings Act 1986 such that a notice unambiguously addressed to a previous tenant could not have been given to the current tenant.

In this case Mr Thomas, held and oral tenancy under the 1986 Act. Mr Thomas incorporated and assigned the tenancy to OG Thomas Agriculture Ltd, a company which shared their home address and of which Mr Thomas was the sole director and shareholder. Three days after the assignment, Mr Thomas himself was served with a notice to quit by the landlord who had no knowledge of the assignment.

The notice to quit was addressed to Mr Thomas and was served by hand and post at Mr Thomas’ address. In considering the validity of the notice the first instance Court and the High Court on first appeal held that the landlord’s notice clearly required the person occupying the land to deliver up possession and was sufficient for it to have been validly given to the company.

The Court of Appeal disagreed on the basis that the notice did not comply with the formal requirement of being addressed to the correct party. The fact that the landlord did not know of the assignment was not relevant. In its conclusion the Court of Appeal set out that a notice addressed to A and received by A cannot be regarded as being a notice given to B, even if A knows that B would have been the correct recipient of it.
Key points

- Establishing the correct recipient of a notice remains of paramount importance, although this is usually only a challenge for unregistered land.
- This case is a useful reminder that the Mannai test will not rescue a defective notice where it does not satisfy the formal statutory requirement.

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WHAT A RELIEF – LEASE CALL OPTIONS AND FORFEITURE

Hush Brasseries Limited v RLUKREF Nominees (UK) One Limited & Anor [2022] EWHC 3018 (Ch)

Hush Brasseries operate a London restaurant under a 25 year lease which is due to expire next year (2024). In 2011 its then landlord granted it an option to call for a renewal lease when its existing lease expired. This call option included a provision allowing the landlord to terminate the option if the tenant fell into arrears or any of the other forfeiture events under the existing lease occurred.

As a result of the COVID-19 pandemic, the tenant fell into rent arrears. Although it was subsequently able to settle these arrears, the landlord chose to rely on the breach as the basis for terminating the option (not the lease). Terminating the option assisted the landlord’s proposed redevelopment plans for the site.

The tenant sought relief from forfeiture from the court and the court first had to determine whether it had the jurisdiction to grant relief. This meant that it had to be satisfied that:

- the option conferred on the tenant a sufficient proprietary interest in the premises and
- the operative termination provision in the option secured the performance of the tenant’s covenants in the lease

On these two points the courts determined that a call option was similar to a purchase option, in creating an equitable interest in the premises. Furthermore, as the option could only be forfeited in consequence of the failure of the tenant to perform one of its covenants, it was held to secure the tenant’s performance.

With both conditions having been satisfied, and in light of the tenant having paid its arrears, the Court granted relief from forfeiture.
Key point

- not all proprietary interests are sufficient to fall within the jurisdiction to grant relief but the case offers a helpful reminder that relief from forfeiture is not just limited to leases

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RENT FREE PERIODS AND LEASE RENEWALS – ARE WE GETTING CLOSE TO SETTLING THE DEBATE?

Old Street Retail Trustee (Jersey) Ltd and Old Street Retail Trustee (Jersey) 2 Ltd v GB Healthcare (County Court at Central London)

A recent lease renewal decision from the County Court in Central London examines again whether to take rent free periods into account when assessing rent pursuant to s34 of Part II of the Landlord and Tenant Act 1954 (the 1954 Act).

The parties had reached an agreement on all but one of the terms of a new tenancy of retail premises in Old Street, London. Rent remained in dispute and needed to be determined by the court pursuant to s.34.

The landlord was willing to grant a tenancy at an annual rent of £148,000, but the tenant argued that the rent should be fixed at £45,000 per annum. Both parties produced expert evidence to support their respective positions.

A key question for the court to determine was whether or not the rent should be adjusted to reflect the absence of a rent free period which would usually be granted in the open market as an inducement to take the lease.

The tenant argued that all of the rent-free period should be amortised to arrive at what most people know as a net-net or day one rent.

The landlord argued that only the pure inducement element of a rent free period should be taken into account (i.e. the rent free attributed to the time it took to fit-out should be disregarded). Its view was that there was nothing in the drafting or purpose of s.34(1) to support the argument that the rent should be artificially depressed to reflect the absence of a fitting out rent-free period which the tenant does not need in reality.

The court decided that the full rent-free package should be taken into account and deducted. The court considered that adjusting the rent would place the parties in the same position as they would be in if a new lease was being granted in the real world, effectively ignoring the fact that the tenant in reality was a sitting tenant with the full benefit of beneficial occupation from day one.

Although the court did not agree with the landlord on the issue of inducements, it did largely favour the landlord’s expert’s evidence and ordered that the new rent be fixed at £112,000 per annum.
Key points

- there remains conflicting County Court decisions on the issue of whether rent-free periods should be taken into account when assessing the rent on renewal pursuant to s34. This decision adds to the debate but it must be remembered that these are all non-binding decisions. Until they are taken to appeal, the issue remains at large to argue each time

- the decision also re-states the position held by the Court of Appeal in the decision of Hoffman J (as he was at that point) in Land Securities plc v Westminster City Council [1993] 1 WLR 286, that arbitration awards are not admissible evidence in a lease renewal. The tenant’s valuation expert had sought to rely on a 2020 arbitration award to support its position but the court determined that that arbitration awards were inadmissible given Hoffman J’s decision.

Many practitioners disagree with the rationale in that decision and, indeed, most rent review arbitration directions expressly provide that Expert Determinations and Arbitration Awards are indeed admissible, albeit at the lower end of the hierarchy of evidence.

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Last year Eversheds Sutherland acted for the ratepayers on a successful business rates appeal before the Upper Tribunal (Lands Chamber) in a decision which is likely to have wider implications for the outdoor leisure activity sector and in particular farm visitor attractions.

The appeal related to a farm visitor attraction in Warrington known as Apple Jacks Adventure Park. The ratepayers were appealing a rateable value of £35,000, which had been upheld by the Valuation Tribunal for England.

It was agreed between the parties that the primary method of valuation to be adopted was a receipts and expenditure valuation (‘R&E’). R&E valuations are typically used when there is insufficient evidence of open market comparable rents to be able to form a view of market rent. Although there are around 400 farm and rural attractions in the UK, the vast majority are operated by the farm owner, meaning that there is very little available evidence of open market rent. R&E valuations seek to arrive at an annual rental value for the premises by assessing the gross receipts which a prospective tenant would expect to achieve from the business and then deducting the expected operating expenses, including the return on capital and the profit that the prospective tenant would require, to arrive at a surplus that, it is assumed, the prospective tenant would be prepared to pay by way of rent. This surplus amount is the rateable value. Although it was agreed that an R&E valuation was appropriate, there was significant disagreement as to the veracity of the Valuation Officer’s (‘VO’) approach to the valuation exercise.

One particular area of disagreement was the VO’s use of what is referred to as a ‘shortened method’ of valuation. Under a shortened method of valuation, the receipts and expenditure of the business are not fully appraised but instead a percentage is simply applied to the business’s gross turnover to arrive at the rateable value. In a previous case, the Tribunal had indicated that such an approach ‘can be useful’ where ‘in respect of a particular mode of occupation, a consistent relationship can be demonstrated between the turnover of business of that type and the level of profit they generate’.

In respect of farm visitor attractions, the Valuation Office Agency (VOA)’s Rating Manual advises that ‘for the vast majority of premises the percentage range will generally be between 6% for the lower value properties with higher overheads and 9% of gross receipts for the best’.

In this instance, the ratepayer had a couple of fundamental concerns regarding such an approach. Firstly, it was not apparent on what basis the VOA had arrived at the 6%-9% figure. It was contended that, in order to rely on a shortened approach, the VOA needs to be able to demonstrate a solid foundation of evidence that underpins such an approach. The VO was unable to point to such evidence. Secondly, it was felt by the ratepayer that such an approach, even if it were underpinned by solid evidence, is a somewhat blunt instrument that fails to give due regard to the particular characteristics of a property and is therefore not appropriate for properties that have unusual characteristics which may make them more expensive to operate such as, in this particular instance, a lack of utility network connections.
Agreeing with the ratepayer, the Tribunal stated:

‘We take the view that the use of the shortened method is ill-advised in the absence of rental evidence or full R&E valuations on which to base the selection of the appropriate percentage. We have already noted a lack of reliable rental evidence in this case .... We therefore attach little weight to [the VO’s] use of the shortened method in this instance.’

The Tribunal reduced the rateable value of the premises to £11,750 which, being below the small business threshold, meaning that no rates are payable.

Key points

– the ratepayers were successful because they were prepared to challenge the VOA’s own published guidance which, it transpired, the VOA was not able to substantiate. If you feel that your rateable value is materially wrong do not simply accept an indication from the VOA that it has been arrived at in accordance with their guidance or in accordance with their standard approach

– if your property has unusual characteristics which you feel may make it less desirable than would ordinarily be the case, ensure that these have been factored into your rateable value

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STATUTORY COMPENSATION AND ‘NON-RELEVANT LAND’ UNDER THE WATER INDUSTRY ACT 1991

Charlton & Charlton v Northumbrian Water Limited [2022] UKUT 313 (LC)

Eversheds Sutherland recently acted for Northumbrian Water Limited (‘NWL’) in what has become the first reported decision on the workings of the compensation provisions at paragraph 2(3) of schedule 12 of the Water Industry Act 1991. The case will be of particular interest to water undertakers and other authorities with powers of compulsory purchase.

The compensation provisions at schedule 12 arise where statutory powers of entry onto land to undertake works are exercised. The compensation provisions make a distinction between ‘relevant land’ and ‘non-relevant land’.

Relevant land means land on which the power of entry is exercised. In brief, the compensation provisions make it evident that compensation is payable for any depreciation in value in the land, and where the owner has sustained other loss or damage as a result of the exercise of the statutory powers (paragraphs 2(1) and 2(2)).

Compensation is more limited in respect of non-relevant land where entitlement to compensation is expressed as follows:

‘Where any damage to, or injurious affection of, any land, which is not relevant land is attributable to the exercise by any relevant undertaker, of any power to carry out pipe-laying works on private land, the undertaker shall pay compensation in respect of that damage or injurious affection to every person entitled to an interest in that land.’ (paragraph 2(3))

In this particular case, NWL had exercised statutory powers in order to undertake significant flood alleviation works at a rural location. The work involved the construction of a large underground retention storage tank designed to regulate water flow in times of heavy rainfall.

The claimants’ home, from which one of them also operated a business, was located on land which neighboured the land in which the flood alleviation works were undertaken. They argued that the presence of the flood alleviation works in such relatively close proximity to their property had resulted in depreciation in its value due to, they said, the negative perception that it may create in

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the minds of a potential purchaser should they ever look to sell.

NWL disagreed that the works had resulted in any depreciation in value of the claimants’ property. In any event, NWL disagreed that paragraph 2(3) provided owners of non-relevant land with an entitlement to claim for any diminution in value that the presence of the statutory works may cause.

The Upper Tribunal had to decide whether the reference to “...any damage to, or injurious affection of, any land...” in paragraph 2(3) is broad enough to include a claim for diminution in value.

The Upper Tribunal considered the meaning of injurious affection, which it believed to be a term of art, developed by caselaw in the context of section 10 of the Compulsory Purchase Act 1965, and expressed its meaning as follows;

- (i) the injurious affection must be the consequence of the lawful exercise of statutory powers, otherwise the remedy is an action in the civil courts
- (ii) the injurious affection must arise from that which will give rise to a cause of action if done without the statutory authority for the relevant scheme of works
- (iii) the damage or injury for which compensation is claimed must be in respect of some loss of value of the land of the claimant
- (iv) the loss or damage to the claimant’s land must arise from the execution of the works and not from the authorised use of the lands, compulsorily acquired following completion of the works
- (v) the amount of compensation must be ascertainable in accordance with general principles which apply to damages in tort

In this instance, given that the alleged diminution in value was said to arise from the presence of the apparatus, rather than the execution of the works, the Upper Tribunal was satisfied that the claim could not be considered to be one for injurious affection.

The Upper Tribunal then went on to consider what types of loss was being referred to by the reference to “any damage to...land” at paragraph 2(3). The claimants argued that it was wide enough to include a claim for depreciation in value of the land. NWL disagreed, and argued for a much narrower interpretation, making the point that if the claimants’ interpretation was preferred then any distinction between the compensation provisions for relevant land and for non-relevant land would be almost entirely eroded.

The Upper Tribunal agreed with NWL’s reasoning and considered that the reference to damage to land was intended to be confined to loss caused by physical damage or to any loss caused by physical factors, such as smells, noise or the obstruction of the light.

Accordingly, the claim was dismissed on the basis that the alleged loss was not said to be caused by injurious affection, physical damage or physical factors.

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SCOTLAND

Scottish leases – a tacit end in sight? A new bill proposes significant reform to Scottish lease law

The Scottish Law Commission is proposing major changes to the rules on lease termination to simplify the position and enable greater flexibility.

At the moment, Scottish commercial leases do not necessarily end on their contractual expiry date. The landlord or the tenant must give sufficient notice to quit at least 40 days before the termination date, otherwise the lease will automatically continue by means of the doctrine of ‘tacit relocation’. What counts as sufficient ‘notice’ to quit can be a contentious issue – an email or a telephone call might be enough depending on the circumstances, but the safest route for a party wanting to end a lease is to serve formal written notice. This notice requirement can catch both sides unawares and lead to confusion and dispute about whether sufficient notice has been given.

When the new legislation, currently embodied in the Leases (Automatic Continuation etc) (Scotland) Bill, comes into force it will be easier for parties to agree that a commercial lease will end on the contractual expiry date and not automatically continue.

The automatic continuation of various types of leases (generally commercial leases) in Scotland means that a lease of more than a year automatically continues for another year beyond its stated expiry date, and then from year to year, until the landlord or the tenant give notice to quit. A lease of less than a year continues for the same original period. In both situations the lease will continue on the same terms and conditions as the existing lease, save as to term, so, for example, the same rent will be payable.

The operation of tacit relocation can cause problems both for landlords and tenants who are unaware of this Scottish concept. Businesses often assume that the termination date stated in the lease is the date on which it will end and are surprised that this is not the case. A tenant looking to vacate will likely be unhappy at being tied into a lease for another year. A landlord may have another tenant lined up. Equally, there are occasions in which both parties are happy for a tenant to remain in situ for another year without incurring the expense of negotiating a lease extension.

In October 2022 the Scottish Law Commission finalised its report on proposed reforms to the Scots law of leases, having obtained comments on its draft Leases (Automatic Continuation etc) (Scotland) Bill. Possibly surprisingly, most respondents favoured keeping a rule that a lease can continue without either party needing to take a positive step to end it. The new draft Bill will deal with various lease issues, introducing a new legislative regime. It re-names ‘tacit relocation’ as ‘automatic renewal’. 
The main changes include:

- commercial leases will continue to renew automatically for another year after termination (or for the same period as the lease if it is for less than a year) until the landlord or tenant give notice to quit
- it will be simpler for parties to agree that automatic renewal will not apply or to agree the length of the continuation
- the amount of notice necessary to terminate the lease pursuant to the notice to quit will depend on the duration of the lease offering certainty to both parties. If it is over six months, three months’ notice or an agreed amount of time will be required. For a lease under six months, one month’s notice will be required. Leases of under three months are not caught by the new Bill
- landlords giving notice must do so in writing. Tenants of leases of up to a year can do so orally or in writing but must give written notice for a lease of over a year
- the Bill sets out the essential information that each party must include in a notice and provides some protection if the notice contains some of the most common errors so that they will not necessarily invalidate the notice
- there will be an implied term of repayment of overpaid rent paid in advance of a post-termination period

Various types of leases will be exempt from the new proposals, for example, residential, agricultural and crofting leases will be excluded.

We do not yet have a date for the new legislation coming into force but it will mark a significant change in the termination of commercial leases in Scotland.

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A TAXING BREAK

Ventgrove Limited -v- Kuehne+Nagel Limited [2022] CSIH 40

A reminder to both landlords and tenants to think about whether VAT is payable on any payments due by tenants looking to exercise a break option. In this decision the Scottish Court of Session appears to be the first court to have reviewed HMRC guidance and policy changes which came into force on 1 April 2022 on whether payments made to exercise a break attract VAT.

A 10 year lease contained a break option entitling the tenant to end it after five years on payment “of £112,500 together with any VAT properly due thereon”. The tenant served a break notice and paid £112,500. The landlord argued the notice was invalid because VAT was due on the payment but was not paid. The landlord had opted to tax the property.

The Outer House of the Court of Session agreed that the break had been validly exercised as VAT was not payable on the break payment. In reaching the conclusion it was noted that, as at the date the payment was due, HMRC had postponed the effect guidance it had issued in September 2020 which stated that all break payments were subject to VAT. The landlord appealed.

The Inner House of the Court of Session had to consider whether VAT was ‘properly due’ on the payment. It concluded the break option payment was a “consideration for a taxable supply of land by the landlord” and was chargeable to VAT. In reaching this conclusion the court referred to the CJEU decisions which had led HMRC to revise its guidance in relation to VAT on break payments. It did not consider that the premium was compensation falling outside the scope of VAT – it said the tenant was exercising a contractual right to end the lease by making a payment that would not have been payable if the lease continued.

The Court therefore determined that the break had not been validly exercised because the tenant had not satisfied the break conditions, and the lease continues. However, the case also continues, with the Court now to hear arguments about whether the landlord had waived the pre-conditions before challenging the break.

Key points

- the decision illustrates the uncertainty which has surrounded the treatment of VAT on break payments over the last few years
- after the initial postponement, HMRC’s revised position in relation to VAT on Break Payments finally came into effect in April 2022. As such VAT may well also be due on any premium to be paid to exercise a break option and parties would need to check the wording of the relevant lease and also whether the landlord has opted to tax in relation to the property concerned
- strict compliance with break conditions is usually required. If the conditions are not met (or waived by the landlord), the lease will not terminate
- landlords should take care not to accept a notice as valid without giving it proper consideration in case they deprive themselves of the ability to challenge the break in future

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On 1 December 2022 the majority of the Renting Homes (Wales) Act 2016 (RHWA) came into force marking another significant divergence between the laws that apply in England and Wales in the residential tenancy field. This imminent development will have an effect on those with a property portfolio which includes residential tenanted property in Wales (including mixed-use properties) as well as those that reside in those properties.

Key features of the development

This is predominantly a tenant friendly piece of law. Its key aims are to make it easier for tenants to let residential property in Wales, to ensure properties are kept to a suitable standard for habitation and to provide tenants with greater security.

Before we look at how the RHWA seeks to achieve these aims, it is crucial to appreciate the new terminology introduced by it. Residential tenancies and licences captured by the RHWA (and most are) are now ‘occupation contracts’ a new type of rental agreement introduced by the RHWA which can run for a fixed term or on a periodic basis. Where the RHWA applies those who have in the past been referred to as tenants, leaseholders or licensees will be known as the ‘contract holders’.

Landlords are divided into ‘community landlords’ (primarily local authorities and registered social landlords) and ‘private landlords’ (all other landlords).

Easier to let

One element of the new regime which should make life easier for contract holders is the fairly standard nature of the occupation contract itself. These contracts will need to include standard terms – broken down as ‘key matters’, ‘fundamental terms’, ‘supplementary terms’ and additional terms’. The most important of these being the fundamental terms which is where we find the landlord’s repairing obligations, succession rights, anti-social behaviour provisions and the possession procedure.

Some standard terms cannot be modified or removed, even by agreement between the parties. Those terms that can be modified or removed require agreement between the parties and such modification/removal must be in favour of the contract-holder.

The RHWA seeks to ensure that contract holders understand the key terms of any new occupation contract by placing an obligation on landlords to serve on the contract holder a ‘written statement of contract’ within 14 days of occupation. The Welsh Government has provided some model statements to assist with this task. Compensation is payable to the contract holder for any failure on the part of the landlord to send the statement or for sending an incorrect statement.

Where existing tenancies are converted to occupation contracts landlords have six months to serve the written statement on the contract holder.

Occupation contracts offer the contract holder a greater element of flexibility. For example, one joint contract-holder can leave a contract without the contract being determined. Further, a new contract holder can be added to the occupation contract without the need to create a new contract. In addition new succession rights are introduced which allow certain individuals the ability to succeed to an occupation contract on the death of the contract holder.

Properties fit for human habitation

One of the aims of the RHWA is to ensure that properties are kept at a minimum standard being “fit for human habitation”. The landlord is incentivised to comply by the fact that no notices can be served (e.g. to terminate the occupation contract) whilst the property is below this standard. There is guidance from the Welsh Government as to what is taken into consideration when determining fitness for habitation and these include issues such as exposure to dust mites, damp, mould and fungal growth. The requirement also turns to a large extent on occupier
safety as can be seen from the strengthened obligations relating to electrical checks, gas safety, and smoke and carbon monoxide alarms.

**Greater security for tenants – terminating an occupation contract**

Perhaps the most significant development is the added security granted to a contract-holder by the rules for termination.

The termination rules differ depending on whether the contract is for a fixed term or is periodic in nature. What is clear, however, is that, under the RHWA, it will be more difficult to terminate any occupation contract on so called ‘no-fault’ grounds.

Where it comes to fixed term tenancies, once the RHWA is in force, unless landlords can prove one of the limited statutory grounds for possession, they will be unable to regain possession for six months (being the prescribed notice period) after a fixed term tenancy has expired. There is a grace period for converted occupation contracts (i.e. where a tenancy existed before 1st December 2022). A two month notice period applies until 1 June 2023 when the notice period will increase to six months.

Those in the education sector should note that Schedule 8A of the RHWA provides that in the case of student accommodation the six-month notice period is reduced to two months.

These developments will clearly have consequences for those seeking to regain control of properties which have been let or licensed to residential occupiers.

The RHWA entitles landlords to make a possession claim where the contract-holder has breached the occupation contract (in limited circumstances). It also introduces termination via one or more of the ‘estate management’ grounds. These estate management grounds include building works and redevelopment. The ability to exercise these grounds is however fettered somewhat: - firstly, by the fact that possession will only be granted if the court is satisfied that suitable alternative accommodation is available to the contract-holder (possibly with the landlord paying the contract-holders reasonable costs of moving); and - secondly, by the fact that the possession order is at the court’s discretion, and that it will only make such an order where it is reasonable to do so (with some guidance offered in the RHWA as to reasonableness).

Although there is a list of matters that the Court will take into account under Schedule 10 of the RHWA, it remains to be seen how the Courts will exercise this power in practice.

All landlords will be interested to note two new powers under the new regime: – the RHWA introduces a new procedure to regain possession of properties which have been abandoned; and – the RHWA introduces a new procedure to regain possession of properties from contract holders who have engaged in anti-social behaviour or prohibited conduct.
What next?

Housing is, of course, a devolved competence in Wales, and landlords in Wales will add the latest obligations to the host of other requirements to which they are subject, including the compulsory system of registration and licensing for landlords and agents involved in letting and managing private residential premises (unique to Wales) and the requirements in relation to tenant deposits (where Wales and England have similar but different obligations). The driving force of these developments is of course to improve standards in the sector. Courts have already no doubt been briefed of the changes and we can already see that procedural rules applying to possession of residential premises are being updated to reflect the new regime. With time it is anticipated that a new strand of case law unique to Welsh tenancies will develop.

In the meantime, landlords and tenants alike will need to understand how the changes affect existing leases and licences and any new occupation contracts granted on or after 1 December 2022. It is vital that landlords are fully aware of their new obligations, make the necessary updates to their properties and paperwork to reflect the changes and understand how their residential leases and licenses can be properly determined.

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The Product Security and Telecommunications Infrastructure Act 2022 received Royal Assent on 6th December, with a number of provisions coming into force immediately and others coming into force upon the passing of further secondary legislation. The Act makes a number of changes to the Telecommunications Code. Of interest to landlords will be the amendment made to the Landlord and Tenant Act 1954, in particular to the assessment of rent under section 34 where it comes to a new telecommunication tenancy.

At present where the court is asked to determine rent for a new telecommunication tenancy under the 1954 Act it must determine the rent which the premises might reasonably be expected to be let in the open market by a willing lessor. This is subject to disregards and having regard to the terms of the existing tenancy, save as to rent.

The Product Security and Telecommunications Infrastructure Act 2022 introduces an alternative rent valuation mechanism. As such the rent for new telecommunication tenancies will be determined by reference to the market value of the landowner’s agreement to confer the code rights (subject to assumptions). We await further regulations for details of when this new framework will come into force.
Rateable values for non-domestic properties in England and Wales

The Valuation Office Agency has revised its rateable values for all business properties and all other non-domestic properties in England and Wales.

Rateable values are reassessed every five means and these new rates, which will come into place on 1 April 2023, are based on property values as at 2s April 2021. The rates will vary depending on whether the property is in England or Wales, and the Government have a service which allows users to get an estimate of what their business rates bill will be from 1 April 2023.

One of the key features of the rateable values is that they are used by local councils to calculate business rates. A rise in a property’s rateable value does not necessarily mean that the property’s business rates will go up by the same amount. However, where businesses are already facing pressures from issues such as inflation rises, interest rates increases and the soaring energy bills, any uplift in the business rates bill could be the final straw for certain businesses.

It should also not be overlooked that these rates are also used when calculating other sums, such as statutory compensation under the Landlord and Tenant Act 1954.

Economic Crime (Transparency and Enforcement) Act 2022 - register of overseas entities

Provisions in The Economic Crime (Transparency and Enforcement) Act 2022 aim to offer greater transparency as to the overseas owners of land in the United Kingdom. They do so by requiring such overseas entities to be registered on the Register of Overseas Entities held at Companies House. On registration the entity will need to also identify any beneficial owners that meet the threshold, which includes, for example, those that hold more than 25% of the shares or voting rights in an entity. This registration requirement applies retroactively where it comes to land owned in England, Wales or Scotland but prospectively where it comes to land owned in Ireland. The deadline to register land already owned (or to dispose of it to avoid the requirement to register) passed on 31 January 2023. There is also a duty to keep the register updated. Sanctions apply for non-compliance.

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MOTION PICTURES

David McGuirk and Carly Fishwick in our Manchester team have been successful in establishing fraudulent misrepresentation against a developer / seller in the case of Partakis-Stevens v Sihan and others [2022] EWHC 3249 (TCC).

Damian Hyndman has been advising upon (i) the impact of the new Product Security and Telecommunications Infrastructure Act 2022 and the amended Electronic Communications Code; and (ii) retail clients upon a host of complaints and issues relating to access to services, reasonable adjustments to properties and related duties under the Equality Act 2010.

Lisa Barge has been advising a global silicon valley corporate regarding rights of light, successfully obtaining a full release to facilitate a circa £1bn redevelopment in the UK.

David Feist and Rebecca Rowley are advising a bingo and gaming operator on a multi-million pound business disruption claim against a combined authority in the UK.

Andrew Todd and Rachel Lindberg have been advising upon Remediation Order proceedings pursuant to s123 Building Safety Act 2022.

Thekla Fellas has a matter that has been listed before the Court of Appeal for a two day hearing commencing on 10 May 2023 in the matter of Vodafone Limited v (1) Potting Shed Bar and Gardens Limited (formerly known as Gencomp (No 7) Limited) and (2) AP Wireless II (UK) Limited CA-2022-002094. The decision in the UT has far reaching effects on the ability for landowners to remove operators in order to carry out a redevelopment of their land and the potential for land to be sterilised from any future development.

Our newly reorganised development disputes team continues to act for major developers such as Land Securities, Berkeley homes and Derwent London advising them on major developments with a particular emphasis on rights to light.
Our dedicated enfranchisement and judicial review team are currently acting for Annington and Terra Firma in the largest dispute that real estate litigation has ever seen over the hostile buy back by the Ministry of Defence of a large military housing portfolio worth over £7.6 billion. This follows the successful outcome of the re-basing of the rent which the team worked on for the last three years. There has and will be substantial press attention over this case which is likely to create legal history in some of the issues being decided. Annington is mounting a legal challenge to the validity of MoD’s actions on both property law and judicial review grounds.
CPD WEBINARS 2023

The next webinars in our 2023 programme are listed below. Please click the links to book on to any of these sessions:

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